FILE COPY

Office Supreme Court, U.S.
FILED
DEC 15 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp., and Stone's Express, Inc., Appellants and Railway Express Agency, Incorporated, Intervenor-Appellant,
160 Broadway,
New York 38, N. Y.

LODER APPEAL PRESS, INC., 65-67 Dunne St., N. Y. C., Tel. WOrth-2-0689

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	4
1. The Application Matter	4
2. The Control Issue	5
3. The Commission's Order	7
4. The Proceedings in the District Court	8
The Questions Are Substantial	8
Conclusion	22
Appendix A	23
Appendix B	45
Appendix C	51

CASES CITED

Alleghany Corp. v. Breswick & Co., 353 U. S. 151, 1 L. ed. 2d 726 (1957)	9, 12
American Trucking Associations v. United States, 355 U. S. 121, 2 L. ed. 158 (1957)	15

PAGE

Atlanta-New Orleans Motor Freight Co. v. United States, 155 F. Supp. 68 (D. C. N. D. Ga. 1953) 18

Atlas Van Lines, Inc.—Control and Merger—Atlas Van Service, Inc. 70 M. C. C. 629 (1957) 14

Breswick & Co. v. United States, 134 F. Supp. 132 (S. D. N. Y. 1955) 20

Complete Auto Transit Inc.—Extension—Willow Run, 71 M. C. C. 383 (1957) 22

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. ed. 126 (1938) 18

Florida v. United States, 282 U. S. 194, 74 L. ed. 291 (1939) 19

Greyhound Mergers, 1 M. C. C. 32 (1935) 6

M. J. Hannon—Control—Hannon Motor Lines, Inc., 39 M. C. C. 620 (1944) 11, 12

Pacific Motor Trucking Co.—Extension—Oregon, 71 M. C. C. 561 (1957) 22

Pan American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810 (CA 2, 1941) 10, 11, 12

Railway Express Agency v. United States, 153 F. Supp. aff'd per curiam, 355 U. S. 270, 2 L. ed. 257 (1957) 6, 10, 18, 21

Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., 39 M. C. C. 271 (1943) 13

PAGE

Schaeffer v. United States, 355 U. S. 83, 2 L. ed. 2d 111 (1958) 18, 19

Schaffer Transportation Co. v. United States, 355 U. S. 83, 2 L. ed. 2d 117 (1957) 16

Schwerman Trucking Co. — Control — Schwerman Trucking Co. of Texas, 80 M. C. C. 382 (1959) 12, 17

Secretary of Agriculture of the United States v. United States, 347 U. S. 645, 98 L. ed. 1015 (1954) 19

Superior Trucking Company, Inc.—Extension—Wisconsin, 77 M. C. C. 51 (1958) 18

Takin Bros. Frt. Line, Inc.—Control—Iowa—Nebraska Transp., 75 M. C. C. 236 (1959) 14

United Parcel Service of Pennsylvania, Inc., Contract Carrier Application, 10 M. C. C. 83 (1938) 6

United Parcel Service of Portland—Purchase—A. J. Wiese, 37 M. C. C. 474 (1941) 6, 13, 14

United States v. Capital Transit Company, 325 U. S. 357, 89 L. ed. 1663 (1945) 2

United States v. Detroit and Cleveland Navigation Company, 326 U. S. 236, 90 L. ed. 38 (1948) ... 2

United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33, 97 L. ed. 54 (1952) 2

United States v. Marshall Transport, 322 U. S. 31, 88 L. ed. 1110 (1944) 9, 12, 13, 14, 15

United States v. Pierce Auto Freight Lines, 327 U. S. 515, 90 L. ed. 82 (1946) 2

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 95 L. ed. 456 (1951) .. 10, 18

STATUTES CITED

	PAGE
Title 28 U. S. C. Sections 1336, 2321-2325	1
Title 5 U. S. C. Section 1009	1
Title 28 U. S. C. Sections 1253 and 2101(b)	1
49 U. S. C. Section 301, et seq.	2
49 U. S. C. Section 307	2, 3, 4, 14, 17
49 U. S. C. Section 5	2
49 U. S. C. Section 321(b)	3
49 U. S. C. Section 310	3
49 U. S. C. Sections 5(4), 5(9), 17(8), 307, 310 and 321(b)	3, 16
5 U. S. C. Sections 1007(b) and 1009(e)	3, 8
49 U. S. C. Section 488	11

AUTHORITIES CITED

Interstate Commerce Commission Sixty-Eighth Annual Report, 1954	8
Trucking Mergers, Concentration, and Small Business: An Analysis of Interstate Commerce Commission Policy, 1950-1956, Report Prepared For the Select Committee on Small Business, United States Senate, June 1957, 85th Cong. 1st Sess.	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

JURISDICTIONAL STATEMENT

On Appeal From the United States District Court For the Southern District of New York

Appellants appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 10, 1960, dismissing their amended complaint which sought to set aside a final order of the Interstate Commerce Commission (hereinafter called the "Commission"), and respectfully submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the District Court for the Southern District of New York is reported in 185 F. Supp. 96 (1960) and is annexed hereto as Appendix "A". The Report of the Commission (Division 1) which was adopted by the entire Commission by order dated February 4, 1960, after petitions for reconsideration were denied, is published in 79 M. C. C. 629 (1959).

Jurisdiction

The suit was instituted under Title 28 U. S. C. Sections 1336, 2321-2325 and Title 5 U. S. C. Section 1009, to set aside an order of the Commission. The judgment of the District Court was entered on June 10, 1960, and notice of appeal was filed in the District Court on August 8, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C. Sections 1253 and 2101(b). The following decisions sustain

the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 97 L. ed. 54, (1952); *United States* v. *Capital Transit Company*, 325 U. S. 357, 89 L. ed. 1663 (1945); *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236, 90 L. ed. 38 (1945); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 90 L. ed. 82 (1946).

Questions Presented

There are two principal questions presented by this appeal which involve the construction and administration of the Interstate Commerce Act, Part II (herein called the "Act"), (49 U. S. C. Section 301 et seq.):

1. May a Certificate of Public Convenience and Necessity be issued to an applicant motor carrier, under Section 207 of the Act, (49 U. S. C. Section 307) where the applicant is party to a control relationship which concededly requires, but has never received, the approval of the Commission under Section 5 of the Act (49 U. S. C. Section 5)?

2. May a motor contract carrier, which is a wholly owned subsidiary of a non-carrier parent which controls other regulated motor carriers, secure authority as a motor common carrier if the parent and other regulated subsidiaries do not join in an application for approval of the new control relationship under Section 5 of the Act (49 U. S. C. Section 5)?

There are three related questions which involve the application of principles of commerce and administrative law:

3. Where the record, as a whole, shows that shippers supported a motor carrier application for a Certificate of Public Convenience and Necessity because of a promise of rates lower than those of competing motor carriers and where the evidence of the applicant's ability to maintain the proposed lower rates is "meagre" and there was no evidence of inadequacy of existing service and no evidence that existing motor carriers would not be adversely affected, does the grant of a Certificate violate the provisions of Section 207 of the Act (49 U. S. C. Section 307) and was the challenged order in this case bottomed upon adequate findings of fact and were these findings supported by substantial evidence?

4. May the Commission, contrary to the provisions of Section 221(b) of the Act (49 U. S. C. Section 321(b)), issue a Certificate of Public Convenience and Necessity before the expiration of thirty days from the date of service of an order of the entire Commission denying petitions for reconsideration of an order of Division 1 of the Commission which granted a Certificate?

5. Did the restrictions imposed upon Applicant, in this case, meet the requirements of Section 210 of the Act (49 U. S. C. Section 310)?

Statutes Involved

Sections 5(2)(b), 5(4), 5(9), 17(8), 207, 210 and 221(b) of the Interstate Commerce Act [49 U. S. C. Sections 5(4), 5(9), 17(8), 307, 310 and 321(b)] and Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U. S. C. Sections 1007(b) and 1009(e)]. These are set forth in Appendix "B" hereto.

Statement

1. The Application Matter:

On or about September 12, 1956, Intervenor-Appellee, United Parcel Service, Inc., formerly known as United Parcel Service of New York, Inc. (herein called "United"), a wholly owned subsidiary of United Parcel Service of America, Inc., a Delaware corporation (herein called the "Parent"), applied for a Certificate of Public Convenience and Necessity as a motor common carrier pursuant to Section 207 of the Act (49 U. S. C. Section 307) seeking authority to transport general commodities in packages of certain limited weights and dimensions between points within the metropolitan area of New York, New York and adjoining portions of New York, New Jersey and Connecticut (herein called the "New York Origin Territory"), and from points and places in the New York Origin Territory to certain points in New Jersey, Connecticut, Rhode Island, Massachusetts and eastern New York, and from points within and adjoining the metropolitan area of Boston, Massachusetts to points and places in Connecticut, Rhode Island, Massachusetts, New Jersey, New York, Vermont, New Hampshire and Maine (herein called the "Boston Origin Territory").

At the time that United filed its application, it held a Permit as a contract carrier which authorized the transportation of various commodities, between retail specialty shops and department stores, on the one hand, and their warehouses and retail customers, on the other, between New York City and adjacent areas in New York, Connecticut and New Jersey and between West Hartford, Connecticut and limited points in New York and New Jersey.

Railway Express Agency, Incorporated (REA), the other appellants and numerous other motor common carriers who also transport packages in the territory which United sought to serve, opposed United's application.

After the hearing, the Hearing Examiner recommended that United be granted authority only from the Boston Origin Territory. As for the New York Origin Territory, the Examiner found, in effect, that there was no need for the additional service proposed by United. However, he specifically recommended that the application be denied because United was not prepared to surrender its contract carrier authority, thereby giving rise to dual operations in violation of Section 210 of the Act.

Exceptions were filed by protestants and United, and Division 1 of the Commission, with Chairman Murphy dissenting, granted all of the authority sought by United. Thereupon, appellants and other protestants filed petitions for reconsideration with the entire Commission, and while these petitions were pending, the appellants (except REA) filed a motion with the Commission requesting that the issuance of a Certificate to United be stayed pending an application which appellants claimed was required to be filed by United, its Parent and various subsidiary motor carriers of the Parent for approval, under Section 5 of the Act, of certain illegal control relationships between and among United, the Parent and its subsidiary motor carriers.

2. The Control Issue:

The basis for appellants' motion was this: prior to 1935, the Parent controlled various subsidiary motor carriers engaged in contract carrier operations. Concededly, continuance of these relationships did not require approval under the doctrine enunciated in *Greyhound*

Mergers, 1 M. C. C. 342 (1935). However, subsequent to 1935, certain of the subsidiary motor carriers which had no authority of any kind, acquired new operating authority and although approval under Section 5 authorizing the control between and among the Parent, the existing subsidiary regulated motor carriers and the new motor carriers was required, it was neither sought nor granted by the Commission.

In 1938, United Parcel Service of Pennsylvania, Inc. (herein called "United of Pennsylvania"), a newly created company, applied for and acquired contract carrier authority under Section 209 of the Act. United of Pennsylvania did not qualify as a "grandfather" carrier. *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938).

In 1941, United Parcel Service of Portland (herein called "Portland"), a regulated carrier, applied for and was granted authority to acquire the contract carrier authority of one A. J. Wiese in *United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M. C. C. 474 (1941). At the date of the application and approval, Portland was a wholly owned subsidiary of United Parcel Service of America, Inc., a Nevada corporation (herein called "Nevada"), a non-carrier, and Nevada was a wholly owned subsidiary of the Parent. Neither the Parent nor the other subsidiary carriers were parties to the application and this control relationship was never approved.

In 1957, United Parcel Service of Cincinnati, Inc. (now known as United Parcel Service, Inc. and herein called "Cincinnati"), while holding a Permit as a contract carrier, acquired a Certificate of Public Convenience and Necessity under Section 207 of the Act. See *Railway Express Agency* v. *United States*, 153 F. Supp. 738, aff'd per

curiam, 355 U. S. 270, 2 L. ed. 257 (1957). Here, too, there was no application by the Parent and the subsidiaries under Section 5 of the Act, although such an application was required there as it was in the case at bar.

At no time, therefore, when new authority was acquired by motor carriers who were and are members of the United family, by acquisition or application, was an application filed under Section 5 of the Act for approval of the common control and management between and among the Parent and its various subsidiary regulated motor carriers.

3. The Commission's Order:

The Commission (with four Commissioners dissenting) denied the various petitions for reconsideration of the report and order of Division 1, and denied appellants' motion to stay the proceedings pending a Section 5 proceeding.[1]

Although the Commission's order denying the petitions for reconsideration and appellants' motion, was dated February 4, 1960, it was not received by appellants until February 26, 1960. On March 9, 1960, a Certificate was issued to United which granted the authority sought. Purportedly to meet the inhibition of Section 210 of the Act, United was prohibited from serving, under its new common carrier authority, those persons which it serves as a contract carrier and the Commission reserved jurisdiction to impose further conditions and limitations to as-

1. A complaint filed by appellants (other than REA) alleging a violation of Section 5 by United, the Parent and the various subsidiary motor carriers was dismissed. The Commission's order of dismissal is reprinted in Appendix "C" for the convenience of this Honorable Court. However, it is not part of the record on this appeal.

sure that United's operations would comply with Section 210 of the Act.

4. The Proceedings In the District Court:

Appellants brought this action in the United States District Court for the Southern District of New York to set aside and enjoin the enforcement of the order of the Commission dated February 4, 1960 and to nullify the Certificate issued thereunder, pursuant to Title 28, U. S. C. Sections 1336 and 2321-2325 and Title 5 U. S. C. Section 1009. As set forth in Appendix "A", the Court below denied appellants' request for relief and dismissed the amended complaint.

The Questions Are Substantial

This appeal presents substantial and important questions concerning the construction and administration of the Interstate Commerce Act, Part II, which have never been passed upon by this Honorable Court. The issues posed by the first two questions also involve matters of profound economic significance in the field of transportation. Since 1935, there has been a secular trend towards concentration of motor carrier facilities, a steady decline in the economic status of the small independent motor carrier (*Interstate Commerce Commission Sixty-Eighth Annual Report*, 1954) and a progressive deterioration in his ability to compete (*Trucking Mergers, Concentration, and Small Business: An Analysis of Interstate Commerce Commission Policy*, 1950-1956, Report Prepared For The Select Committee on Small Business, United States Senate, June 1957, 85th Cong. 1st Sess.). If a vast network of commonly controlled corporations can escape the searchlight of a Section 5 proceeding by acquiring operating authority through newly created subsidiaries or by the so-called addition to

one type of operating authority of an entirely different type of authority, the perimeter of power of large motor carriers is extended without regard for the Congressional principles embodied in Section 5 and in violation of the National Transportation Policy.

Further, the decision by the Court below places a gloss on *Alleghany Corp.* v. *Brewick & Co.*, 353 U. S. 151, 1 L. ed. 2d 726 (1957) which renders that case and *United States* v. *Marshall Transport*, 322 U. S. 31, 88 L. ed. 1110 (1944) irreconcilable. It is urgent, therefore, that this Court announce whether or not Section 5 is jurisdictional (Appendix "A", p. 40).

The Court below held that the patent violation of Section 5 by United and its Parent "did not forbid the issuance of a Certificate" to United (Appendix "A", p. 40). For this, the Court below relies upon its exiguous assumption that the Commission can, in a case such as the one at bar, forgive a violation of Section 5(4) and, simultaneously, reward a violator (Appendix "A", p. 40). It is plain that the District Court misreads the statute and the decisional precedents.

The Court below has also vitiated the statutory provisions relating to public convenience and necessity and the relevant decisional precedents. In essence, the District Court has held that a Certificate of Public Convenience and Necessity may be issued if there is a promise of low rates to the shipping public, despite the absence of any proof that the proposed service can be profitably conducted and notwithstanding a failure by the applicant to prove, first, that adequate service cannot be obtained from existing motor carriers and, second, that existing motor carriers will not be adversely affected. The insupportable action of the Commission is sustained by the Court by re-

sorting to the wellworn caveat that courts ought not to interfere with the judgment of an administrative agency. Although the Court below properly found that the decision in *Railway Express Agency* v. *United States*, 153 F. Supp. 738, aff'd per curiam, 355 U. S. 280, 2 L. ed. 2d 257 (1957) is not controlling here, (Appendix "A", p. 30) it proceeded to rubber stamp the Commission's order, contrary to the principles enunciated in *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 2 L. ed. 2d 117, (1957) and *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 95 L. ed. 456 (1951).

Additionally, the Court below misconstrued and rewrote Section 221(b) of the Act by converting the mandatory language into a permissive text which allows the Commission to determine whether it will be bound by the provisions of the Act.

Finally, United was permitted to engage in dual operations contrary to the National Transportation Policy and Section 210 of the Act and without any probative findings that the dual operations are consistent with the public interest. The conditions imposed by the Commission in United's Certificate do not foreclose the possibility of discriminatory practices against which the Act was designed.

1. Although the Court below acknowledged that there were and are unapproved control relationships between and among United, the Parent and the various subsidiary motor carriers contrary to the provisions of Section 5 of the Act, (Appendix "A", p. 40), it was held that this did not preclude the issuance of a Certificate to United. To reach this result, the District Court relied upon the decision in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (CA 2, 1941), in which the Court of Appeals for the Second Circuit decided that the "control"

provisions of the Civil Aeronautics Act (49 U. S. C. Section 488) did not preclude the issuance of new authority despite the existence of an unlawful control relationship.

The District Court in this case erroneously assumed that the identical result must follow under Section 5 of the Act and that the Commission had accepted the *Pan American* doctrine (Appendix "A", pp. 38-39). The fact is that the Commission rejected the *Pan American* principle *in M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944) where the Commission held:

> "It is apparent that without approval under Section 5(2) to control the two motor carriers, Hannon would immediately be in violation of the specific prohibition of section 5(4) upon his exercise of the authority granted under Section 209. The words 'or otherwise' appearing in Section 5(2) are broad enough to encompass what Hannon proposes as a permissively lawful transaction thereunder, and which we are empowered to approve if we find it to be consistent with the public interest. Compare Pan American Airways Co. v. Civil Aeronautics Board, 121 Fed. (2d) 810, (p. 622)."

In *Hannon* the Commission refused to issue a Certificate where a control relationship had not been first approved under Section 5 of the Act. Simply stated, the facts in *Hannon* were on all fours with the facts in *Pan American*. Both the Commission in *Hannon* and the Court of Appeals in *Pan American* held that a control relationship was created immediately as authority was granted to an unregulated subsidiary. But while the Court in *Pan American* held that authority could be granted despite the unapproved control relationship, the Commission held directly to the contrary.

The phrase "Compare Pan American" which appears in the *Hannon* report shows that the Commission did not accept the *Pan American* principle as applicable to the Act. This was made evident, once again, in *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959) where the Commission refused to issue a Certificate until there was prior approval, by the Commission, of the control relationship under Section 5.

This result is consistent with the teaching of *United States* v. *Marshall Transport Co., supra,* where this Court held (pp. 40-42) that the Commission has no authority to proceed with an application which involves an unapproved control relationship in the absence of an application, under Section 5 of the Act, for approval of that relationship.

Contrary to the conclusion of the District Court, the decision in *Alleghany Corporation* v. *Breswick & Co., supra,* does not attenuate the Marshall doctrine. This Court did not say that Section 5 is not jurisdictional so that the Commission may approve applications where a controlling carrier or non-carrier is not party to a control application, but rather that it is "not strictly jurisdictional in the sense that if the Commission wrongly decides" that A does not control B which seeks to control C that "the Commission loses jurisdiction over B, the power to regulate B" (p. 171). In short, a wrong decision exculpating a person or corporation from regulation under Section 5 does not foreclose the later assertion of jurisdiction by the Commission. The illustration given by this Court in the *Alleghany* case, *supra,* demonstrates the egregious error of interpretation committed by the District Court.

Clearly, then, the fact that the Parent and the other motor carrier subsidiaries did not join in a Section 5 pro-

ceeding at the time of the *Wiese* case, *supra*, and when United of Pennsylvania acquired operating authority, did not erase the Commission's jurisdiction or nullify the mandate of Section 5 in this case. The unlawful control relationships were never approved by the Commission in a Section 5 proceeding and the Commission may not waive this law violation. Indeed, the District Court overlooked the Commission's report in the *Marshall* case (*Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co.*, 39 M. C. C. 271, 276 (1943)), where the Commission said:

> "If we have approved applications in the past where the factual situation as to the point here involved correspond to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. 'Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a 'policy' not expressed in the statute itself. United States v. Illinois Central R. Co., 263 U. S. 515; Southern Pac. Co. v. Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541."

The suggestion by the Court below that the Commission may grant new rights "when the violation of Section 5(4) has been due to excusable oversight or neglect" (Appendix "A", p. 38) is plainly wrong. The Commission has held that an illegal control relationship already in existence may be approved where the parties desire to purge themselves of a violation by filing a control application and the evidence shows that the transaction would be consistent with the public interest in other respects and there is strong evidence of an absence of intent to flaunt the law.

Atlas Van Lines, Inc.—Control and Merger—Atlas Van Service, Inc., 70 M. C. C. 629 (1957); *Takin Bros. Frt. Line, Inc.—Control—Iowa-Nebraska Transp.*, 75 M. C. C. 236 (1959). In other words, the existing illegal control relationship between United and its subsidiaries could be approved under Section 5(2) notwithstanding a violation of Section 5(4), but this is far different fro msaying that despite the admitted existence of illegal control, the Commission may grant new or additional authority to a violator who does not submit a Section 5(2) application. This Court has said as plainly as it can be said that the Commission has no authority to act on an application or approve it if there is a Section 5(4) violation. That there is a present violation of Section 5(4) is made clear by the Commission's order dismissing the complaint (Appendix "C", p. 51). Under these circumstances, the Commission had no jurisdiction to grant the application.

When, subsequent to 1935, the *Wiese* acquisition was effected; when Pennsylvania was granted new authority; when Cincinnati obtained common carrier authority, the control of the Parent and the intra-corporate control relationships should have been submitted for approval under Section 5. When the instant application was filed and processed, United, the Parent and all the subsidiaries were in violation of the Act. Hence, this application should not have been granted not only because *Marshall* dictates that result but because the Act so provides.

Section 207 (49 U. S. C. Section 307) provides that no certificate can issue unless the applicant is " * * * able * * * to conform to the provisions of this chapter and the requirements and rules and regulations of the Commission thereunder * * * ". The language of the statute is explicit and allows for no exception. In short, the Commission had no jurisdiction to issue a Certificate to United

until the control relationships were submitted for approval and United, the Parent and other subsidiaries conformed with the law.

Certainly, with the decision in *Marshall, supra,* the law was clarified and immediately thereafter it was incumbent upon either the United family, on its own initiative, or upon the Commission, on its own initiative, to require the United system to come into compliance with the Act.

If a layman is deemed to know the law, surely a large carrier, ably represented by trained counsel, must be presumed to know that *Marshall, supra,* construed the law as it was originally written by Congress.

The Commission may be loathe to retroactively apply the *Marshall* doctrine to the transaction consummated prior to that case (Appendix "C"), but this did not sanction new privileges and licenses when it became clear, as it is now, that the control relationship is illegal and does require approval. At best, since the past completed transactions antedated *Marshall,* United, the Parent and its subsidiaries could and should have come forward and sought approval of the illegally consummated control arrangement and the Commission would not have been barred from granting it.

The District Court's reliance (Appendix "A", p. 37) upon the decision in *American Trucking Associations* v. *United States,* 355 U. S. 121, 2 L. ed. 158 (1957), to prove that Section 5(2)(b) is not applicable to proceedings under Section 207 of the Act, is misapplied and misplaced, since that case only involved the standards which must be applied when a railroad applies for unrestricted motor carrier authority.

Obviously, the District Court misunderstood the special character of the policy and statutory problems which arise when a railroad seeks to invade the trucking field.

All that this Court said is that if a railroad meets the statutory tests under Section 207, there is no need to restrict trucking service to that which is auxiliary to, and supplemental of, rail service. But this Court did say, too, that:

> "'the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207'' (pp. 151-152).

Appellants do not suggest that Section 207 and Section 5 promulgate the identical tests. Appellants do say that Section 207, by its terms, precludes a grant of authority to a carrier who is in violation of Section 5(4) of the Act.

2. The Court below concluded that there was no violation of Section 5, i.e., the Parent and its subsidiary motor carriers was not required to join in an application, when United, as a contract carrier, obtained common carrier authority and when, in 1957, Cincinnati, as a contract carrier, obtained common carrier authority. The Court reasons that since Section 203(a)(16) defines a "motor carrier" as including both a common and contract carrier and Section 5(2) relates only to the acquisition of a "carrier"; there was no violation of Section 5 since no new carrier was acquired in this case. However, Section 5 is not limited to the situation where a new carrier, as a separate entity, is acquired. Thus, the Court below would apply Section 5 only if a different non-carrier subsidiary of the Parent had applied for and obtained the Certificate. But Section 5 is not to be so narrowly construed. Under Section 5 of the Act, a control application must be filed where the control is accomplished "by any means whatsoever." (49 U. S. C. Section 5(4)). This includes the case where a non-carrier Parent, in control of contract carrier subsidiaries, acquires control of a common carrier

operation by reason of the grant of common carrier authority to one or more of its contract carrier subsidiaries. Section 5 does distinguish between common and contract carriers and does not indiscriminately commingle the two. Thus, under Section 5(1) of the Act, only common carriers may engage in pooling. Indeed, the Commission in *Schwerman Trucking Co., supra,* (p. 392) recognized a difference between existing rights and "an entirely *new* situation, namely, a grant of *new* operating authority permitting the performance of a competitive carrier service * * * ".

Here, too, the entire structure of the United family was altered when Cincinnati and United obtained common carrier authority. Thus, while it might be consistent with the public interest for the parent to control subsidiary contract carriers, an entire new question arose when common carriers were added to the family. The potential monopoly thus created and the new competitive position of the United family should have been approved by the Commission. The importance of this question could not be avoided upon the sole ground that a new corporate entity was not created. The cases cited by the District Court (Appendix "A", pp. 39-40) and relied upon by the Commission are not dispositive because the "control" issue was either entirely absent or not raised.

3. The grant of a Certificate to United and the affirmance by the Court below is contrary to a long line of cases construing the statutory standard of "present or future public convenience and necessity" (49 U. S. C. Section 307). Instead of requiring proof of a public need for service and evidence that existing motor carriers are unable to provide the proposed service and that they will not be adversely affected, a Certificate was issued to United based upon the alleged desire of shippers for lower rates

and upon the conjecture that United could operate profitably at its proposed low level of rates. This Court has pointed out that lower rates are a factor in the consideration of public convenience and necessity only where different modes of transportation are involved. (*Schaeffer* v. *United States*, 355 U. S. 83, 91, 2 L. ed. 2d 111 (1958). Clearly, the application should not have been approved upon the promise of low rates, particularly where the same mode of transportation was involved. *Superior Trucking Company, Inc.—Extension—Wisconsin*, 77 M. C. C. 51 (1958); *Atlanta-New Orleans Motor Freight Co.* v. *United States*, 155 F. Supp. 68, 71 (D. C. N. D. Ga., 1953). If a shipper is aggrieved by existing rates, Section 216 provides statutory redress. Absent the promise of lower rates by United, the shipper witnesses would not have supported the application and there was no evidence that shippers required additional motor carrier service.

Assuming, *arguendo*, that rates were a factor for consideration, there was not an iota of evidence that United could operate at the level of rates proposed. The Court below states that the evidence here was "meagre" (Appendix "A", p. 33). It was not "meagre"; it was nonexistent. Surely, neither "meagre" evidence nor the District Court's conclusion that United would not have filed the application unless the operations would be profitable does not meet the criteria of substantiality. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126 (1938); *Universal Camera Corp.* v. *N. L. R. B.*, *supra*.

Railway Express Agency v. *United States*, 153 F. Supp. 738, aff'd per curiam, 355 U. S. 270, 2 L. ed. 2d 234 (1957) is not dispositive here. Here, unlike that case, appellants, among other motor carriers, were providing the necessary service responsive to public demand. While the Court below acknowledged a difference in facts (Appendix "A",

p. 30), it improperly discounted the services of existing motor carriers because the proposed service was allegedly better than parcel post and because the District Court incorrectly found that no one protestant carrier could provide all the service proposed by United (Appendix "A", p. 31). But this conclusion was contrary to the evidence and the law. To begin with, the question as to parcel post service was not an issue in the proceeding. The appropriate standard of comparison was the service performed by appellants and other motor carriers. The evidence overwhelmingly established that appellants and other motor carriers did provide the same service which United proposed and this was also superior to parcel post.

As the Court said in the *Schaeffer* case, *supra*, a reviewing Court ought not "summarily * * * approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress" (p. 121). Appellants respectfully submit that the decision in this case departs radically and unjustifiably, without explanation, from the standards which must be employed in determining "present or future public convenience and necessity." *Florida* v. *United States*, 282 U. S. 194, 74 L. ed. 291 (1939); *Secretary of Agriculture of the United States* v. *United States*, 347 U. S. 645, 98 L. ed. 1015 (1954).

4. The order of the Commission dated February 4, 1960 which approved United's application, was not received by the appellants until February 26, 1960 and was not released or "served" before February 24th or February 25th, 1960. The Certificate was issued on March 9, 1960, so that the order of February 4, 1960 was made effective within less than thirty (30) days of service in violation of Section 221(b) of the Act.

Section 221(b) of the Act specifically provides that all orders of the Commission "shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe * * *". Clearly, the order dated February 4, 1960 was made effective in less than thirty days and, hence, the Commission's act in issuing the Certificate was a nullity.

The Court held, however, that "we think it would be undue literalism to construe Section 221(b) as directing that an order which merely declares the Commission's unwillingness to review the action of one of its divisions, otherwise legally effective, and thereby terminates the stay of Section 17(8), cannot become effective for thirty days." (Appendix "A", p. 42). This is a plain misreading of the Commission's order. That order is not merely procedural in the sense that it denies a motion. The order affirmatively adopted the findings of fact and conclusions of law of Division 1 as if the Commission had set forth the findings and conclusions in a separate report and this order thereby became a "new" order, i.e., an order of the full Commission. Section 221(b) is meaningful when applied to orders of the Commission. The thirty day period is designed to afford a party a reasonable period to file a further petition for reconsideration or to file a petition for a temporary injunction restraining the issuance of a Certificate pending judicial review. Indeed, as the Court below recognized: "To be sure, permitting the order of a division to become effective immediately on the denial of reconsideration by the full Commission may create problems with respect to judicial review, as was vividly illustrated in *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 136 (S. D. N. Y. 1955)". (Appendix "A", pp. 42-43).

The statute is clear and explicit and appellants did not have the burden of showing prejudice (which they did, in

any case) in order to object to a clear violation of the statute.

5. United has been granted the right to engage in dual operations contrary to the provisions of Section 210 of the Act which provides that no one person shall operate as a common and contract carrier unless it is consistent with the public interest and National Transportation Policy. The purpose behind the Act was to prevent possible discriminatory practices which arise by reason of a grant of authority to serve the public either as a contract or common carrier. This possibility of discrimination is particularly significant when the same commodities may be transported in the same territory under either authority. These are precisely the facts in this case. In granting dual operating authority, the Commission made no finding that this would be consistent with the public interest and the National Transportation Policy nor was there any evidence adduced to support such a finding. There was no explanation why the Commission departed from prior norms and criteria where, as in *Railway Express Agency* v. *United States, supra*, Cincinnati was required to consent to a partial revocation of its contract carrier authority before it could obtain common carrier authority.

Additionally, the restrictions imposed here are meaningless because they are clearly incapable of enforcement or being policed. United will use the same equipment, terminals, facilities and employees for common and contract carriage; it will not and cannot maintain separate cost accounting procedures; it can, through the medium of its present retail cost-plus contracts, recover losses from its wholesale operations; it can apply flexible rates; it can subsidize one type of service at the expense of another and to the detriment of competing carriers who

are not favored with the two types of duplicating authority.

The decisions in *Complete Auto Transit Inc.—Extension—Willow Run*, 71 M. C. C. 383 (1957) and *Pacific Motor Trucking Co.—Extension—Oregon*, 71 M. C. C. 561 (1957), relied on by the Court and the Commission, do not support the granting of dual authority here.

Conclusion

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve an application if an illegal control relationship exists, that public convenience and necessity is not established by low rates and that the Commission may not grant a Certificate unless the order is bottomed upon basic findings supported by substantial evidence. Additionally dual operations were improperly authorized.

Appellants believe that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Interstate Commerce Commission and those who are regulated by, and are subject to the jurisdiction of that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp., Stone's Express, Inc., and Railway Express Agency, Incorporated

December 14, 1960.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Cv. 1045

YALE TRANSPORTATION CORP., EMPIRE CARRIERS CORP., STONE'S EXPRESS INC., and RAILWAY EXPRESS AGENCY, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and UNITED PARCEL SERVICE, INC.,

Defendants.

OPINION

APPEARANCES:

For Plaintiffs Yale Transportation Corp., Empire Carriers Corp. and Stone's Express Inc.:

ZELBY & BURSTEIN, Esqs., by: Herbert Burstein, Esq., of counsel.

For Intervenor Plaintiff, Railway Express Agency Inc.:

WILLIAM H. MARX, Esq.

For Intervenor Plaintiffs Bilkays Express Co., Jersey Coast Freight Line, Inc., Mahon's Express and Parcel Delivery Service, Inc.,

WILLIAM T. GRIFFIN, Esq., of counsel.

For Defendant United States of America and Interstate Commerce Commission:

ROBERT A. BICKS, Esq., Acting Assistant Attorney General and

S. HAZARD GILLESPIE, U. S. Attorney, Attorneys for the United States, by: Donald L. Hardison, Esq., Attorney, Department of Justice, and H. Neil Garson, Esq., Assistant General Counsel, Interstate Commerce Commission, of counsel.

For Intervenor Defendant United Parcel Service, Inc.:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, New York, N. Y.

SCHNADER, HARRISON, SEGAL & LEWIS, Philadelphia, Pa., by: Bernard G. Segal, Esq., Irving R. Segal, Esq., Robert L. Kendall, Jr., Esq., and Jacob Imberman, Esq., of counsel.

Before:

FRIENDLY, Circuit Judge;
MURPHY, and PALMIERI, District Judges.

FRIENDLY, Circuit Judge:

Yale Transport Corporation and two other holders of certificates of public convenience and necessity for common carrier service by motor vehicle here seek to enjoin the enforcement of an order of the Interstate Commerce Commission granting an application of United Parcel Service of New York, Inc., hereafter UPS, under §207 of the Motor Carrier Act, 49 U. S. C. §307, for a certificate to operate as a common carrier. The jurisdiction of the Court is invoked under 28 U. S. C. §§1336 and 1398; a

court of three judges has been constituted as provided in 28 U. S. C. §§2325 and 2284. Railway Express Agency, Inc. and four other holders of common carrier motor vehicle certificates have intervened in support of plaintiffs; they and the three plaintiffs will be referred to as protestants. UPS has intervened as an additional defendant.

UPS is one of a number of operating companies controlled by United Parcel Service of America, Inc., a Delaware corporation, hereafter UPSA. UPS has long held permits authorizing it to engage as a contract carrier with retail specialty shops or department stores in transporting various commodities between such shops and their warehouses and customers (a) between New York City and adjacent areas in New York, Connecticut and New Jersey, and (b) between West Hartford, Connecticut, and three points in New York and one in New Jersey. In addition UPS has been operating since 1953 as a common carrier rendering what is termed wholesale service in intrastate commerce within New Jersey and in the New York City commercial zone as defined by the New York Public Service Commission and in interstate commerce within that portion of the New York City commercial zone as defined by the Interstate Commerce Commission which was covered by the partial exemption from regulation conferred by §203 (b) (8), 49 U. S. C. §303 (b)(8). An affiliate, United Parcel Service, Inc., a Massachusetts corporation, has been engaged since 1956 in contract carrier service for stores in the Worcester, Mass. area and in wholesale common carrier intrastate service within Massachusetts.

UPS' application here was for authority to engage in the common carriage of general commodities (1) between points within the metropolitan area of New York City and certain adjoining portions of New Jersey, New York

and Connecticut; (2) from points in the above area, described as the New York origin area, to points in 13 counties in northern New Jersey, points in Connecticut, Massachusetts, Rhode Island, and a specified territory in eastern New York and returned shipments of the same commodities previously delivered; and (3) from points within and adjoining the metropolitan area of Boston, Mass., described as the Boston origin area, to points in Connecticut, Rhode Island, Massachusetts, northern New Jersey, a described territory in eastern New York, and southern portions of Vermont, New Hampshire and Maine, and returned shipments of the same commodities previously delivered. The authority was sought subject to certain restrictions which, so far as here material, are as follows:

(a) No service was to be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, with each package or article considered a separate shipment;

(b) No service was to be rendered between department stores, specialty shops and retail stores and their branches or warehouses or between any of them and the premises of customers; and

(c) No service was to be provided in the transportation of packages weighing more than 100 pounds from one consignor at one location to one consignee at one location on any one day.

The application was heard by an examiner. UPS introduced extensive evidence as to the nature of the operation proposed. The service was designed to handle large volumes of small packages in a faster, more efficient and more economical manner than United States parcel post service, at roughly comparable rates; its gen-

eral character was similar to that out of the Chicago area as to which this Court sustained the grant of a certificate in *Railway Express Agency* v. *United States*, 153 F. Supp. 738 (S. D., N. Y.), *aff'd per curiam*, 355 U. S. 270 (1957). Special features included daily automatic pickups, in consideration of a weekly service charge proposed to be $4.00 in the New York origin area and $2.00 in the Boston origin area; next-day delivery service throughout most of the destination territory; deliveries at consignee's premises wherever located and without regard to distance from main highways; a second and, if necessary, a third attempt at delivery if this could not be earlier completed; every reasonable effort to secure the correct address, and notification of this to the consignor, when a package had been misaddressed; return without additional charge of packages which were refused by the consignee or for any other reason could not be delivered; specially designed records to permit prompt answering of inquiries; automatic protection against loss or damage up to $100 per package; receipt of checks as well as cash for C. O. D. shipments; deliveries by uniformed drivers and with vehicles maintained at a high standard of appearance; facilities to permit the handling of fragile merchandise with a minimum of packaging; and collection and return of any package previously delivered, at a charge equal to that for original delivery. All charges were to be billed to and paid by the shippers and hence all shipments would move prepaid.

A large number of shippers from both areas testified as to the advantages of the service proposed by UPS and as to their desire to use it. Protestants and other motor carriers offered evidence as to the availability of service within the area and asserted that UPS' proposed service, although perhaps designed to compete primarily with parcel post, would divert considerable amounts of small

package traffic now moved by them and thereby jeopardize the financial soundness of their service.

The Examiner recommended that the application be granted as regards the Boston origin area but be denied as regards the New York origin area. He rested the latter recommendation primarily on the ground that superimposing common carrier authority upon UPS' existing contract authority in the New York area would result in "dual operations" inconsistent with §210 of the Motor Carrier Act, 49 U. S. C. §310. He distinguished the grant of authority in the Chicago area sustained in *Railway Express Agency* v. *United States, supra*, on the basis that the applicant there had consented to a condition cancelling the portion of its contract permit that authorized service between points to be included in the common carrier certificate.

Exceptions having been taken by both applicant and the intervening motor carriers, Division 1 of the Commission sustained the Examiner's affirmative recommendation as to the Boston area and reversed his negative recommendation as to the New York area, 79 M. C. C. 629 (1959). It found that UPS would furnish a distinctive and useful service not now being furnished either by parcel post or by any of the intervening motor carriers, reviewed the evidence with respect to diversion, and concluded, p. 654, that the proposed service was "responsive to a public need which cannot be met adequately by existing transportation facilities and that it can be performed without adversely affecting the operations of existing carriers contrary to the public interest." The Division also found that the dual operations would not be inconsistent with the public interest provided this was safeguarded by two additional conditions. One of these prohibited deliveries to as well as from the prem-

ises of persons who had entered into contracts with the applicant and were served by it pursuant to permits issued by the Commission. The other reserved to the Commission the right to impose in the future such terms, conditions or limitations on the certificate as it might find necessary to insure that applicant's operations conformed to the provisions of §210. One Commissioner dissented with respect to the New York area on the ground that applicant had failed to meet its burden of proving that "existing carriers specializing in handling small packages are not willing and able to meet the needs shown for service to and from the New York City area", p. 657.

The protestants thereupon applied for reconsideration by the Commission, 49 U. S. C. §17 (b). In consequence the effectiveness of the order of Division 1 was stayed, 49 U. S. C. §17 (8). By order dated February 4, 1960, the petitions for reconsideration were denied. This action followed. Judge Palmieri denied a temporary restraining order and the case is before us on a stipulation that we shall consider the hearing as for both temporary and final relief.

Protestants attack the Commission's order on four principal grounds. First, they assert that the Commission did not have adequate evidence to support its findings of public convenience and necessity of the proposed service and of fitness and ability of the applicant to render it. Second, they contend that the Commission ought not have granted the application in view of the prohibition against dual operations in §210. Third, they urge that the grant of the application is contrary to commands of §5 of the Interstate Commerce Act, 49 U. S. C. §5, relating to acquisitions of control. Finally, they argue that the Commission violated the require-

ments of §221 (b) of the Act, 49 U. S. C. §321 (b), in permitting the certificate to become effective when issued on March 9, 1960, although the order of February 4, 1960 denying reconsideration was not served until February 24 or 25. After careful review we find none of these contentions sufficient to warrant enjoining the Commission's order.

I—Convenience and Necessity and Fitness and Ability

Defendants contend that the issue of convenience and necessity is largely foreclosed by *Railway Express Agency* v. *United States, supra;* protestants assert the circumstances here are significantly different. Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case. Nevertheless, any differences in the evidence as to the value of UPS' service, the availability of other service, and diversion, are not sufficient to take the case out of the area committed to the Commission's judgment. We turn, therefore, to issues of other sorts.

Protestants claim that UPS was merely proposing to render at a lower rate the same service that protestants were rendering or, at least, were able and ready to render. They cite statements of the Commission that an offer of a motor carrier applicant to perform similar services at rates lower than those existing does not warrant the issuance of a certificate, see, e.g., *Interstate Dress Carriers, Inc.*, 77 M. C. C. 787, 791 (1958), these statements being sometimes supplemented with the further remark that "If the rates of protestants are considered by the shippers to be unreasonable, relief is available under other provisions of the Interstate Commerce Act", *Superior Trucking Co.*, 77 M. C. C. 51, 58 (1958).

See also *E. L. Reddish Contract Carrier Application*, 13 Fed. Carrier Cases P 34657 (ICC 1959).[1] They distinguish *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83 (1957), which reversed a denial of a certificate grounded by the Commission on this view, 63 M. C. C. 247 (1955), as dealing with the offer of lower rates by one form of transportation as against another form, the lower rates offered by the motor carrier in that case representing "inherent advantages" of motor as against rail transportation which the National Transportation Policy, 49 U. S. C. preceding §1, required the Commission to regard. It is unnecessary for us to determine whether a finding of public convenience and necessity premised solely upon the ability of an applicant, due to alleged superior resourcefulness and efficiency, to offer rates lower than other carriers of the same *genus*, would be adequately supported. For our review convinces us that protestants' assertion misconceives the evidence and the conclusions that the Commission drew from it.

The evidence of the shipper witnesses, painstakingly reviewed in the report of Division 1, shows that UPS was offering not simply a cheaper but a better mousetrap. It was better than parcel post because of the pickup, assured delivery times, repeated attempts to effect delivery and other features mentioned above. It was better than any service offered by existing motor carriers because although some of these carriers may have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete. The real thrust of protestants' rate argument

[1] In *Schirmer Transportation Co.*, 77 M. C. C. 240, 242 (1958), however, the Commission intimated it might consider an applicant's proffer of lower rates a ground for issuing a certificate if the rates of existing carriers constituted an "embargo" on the movement of the commodity in question.

thus does not lie in the extreme form just stated but rather in their contention that the shippers indicated they would not utilize applicant's service if its rates were higher than parcel post and applicant produced no adequate evidence of its ability to operate at the rates proposed. There would be force in such an argument if it were factually sustained. However, our review of the evidence indicates that neither branch of the argument is supported, at least in the measure that it would have to be to warrant setting aside the Commission's order.

Protestants did elicit, in their cross-examination of a considerable number of shipper witnesses, testimony, in varying degrees of emphasis, that the cost of any service was a consideration and that, however attractive applicant's proposed service was, the attraction would disappear if there were a substantial rate differential as against parcel post. However, it was hardly to be expected that prospective users of applicant's service would publicly announce their firm intention to use it whatever rate applicant might choose to charge. A number of the shipper witnesses were not cross-examined on the point at all, and a few indicated they would use applicant's service even if the rates were considerably higher than parcel post.[2] Neither is it true that UPS submitted no evidence as to its ability to maintain the proposed rates. Applicant presented an exhibit showing that on its relatively small intrastate wholesale operation in New York, the rates of which were similar to those proposed, it had earned, in 1956, a profit of $76,066 on operating revenues of $2,016,680, with an operating ratio of 96.17% in this service as against its overall operating ratio of 97.57% on its total business of nearly

[2] One witness testified "It is worth that to us, even if it was doubled." Others said that service was the prime consideration and rates were only secondary.

$26,000,000.[3] High as such ratios may seem to those used to dealing with other public utilities, the rapid capital turnover characteristic of motor carriage resulted in applicant's overall operating ratio of 97.57% in 1956 yielding a return of some 19% before income tax on its equity and advances from an affiliate. Applicant's witness also testified that "both the retail contract operation and the wholesale common carrier operation have been profitable" for each of the UPSA affiliates save only "a small pilot operation of this wholesale common carrier type" in Minnesota, a wholesale common carrier operation in Michigan, and the new operation in Massachusetts. It is perhaps surprising that applicant did not produce more substantial evidence upon this point, although some of the wholesale operations may have been too recent, when the witness was testifying over three years ago, to have yielded much useful data. Meagre as this evidence was, we cannot say that when it was combined with the more general testimony "that applicant and its affiliates are thoroughly experienced in the transportation of small packages and have developed efficient and economical methods for the handling of such traffic", 79 M. C. C. at 656, and a common-sense inference that so experienced an operator would not deliberately embark reputation and capital on a venture it did not reasonably think it could perform, there was not adequate basis for the Commission's finding that applicant "has made a favorable showing in this respect", both as this bears on convenience and necessity and on fitness and ability.

[3] For the same year the industry-wide figures were 96.3% for interstate carriers and 96.7% for local carriers. Ann Rep. I. C. C. 1957, p. 161.

II—Dual Operations

Section 210 of the Act, 49 U. S. C. §310, prohibits any person from holding both a permit as a contract carrier and a certificate as a common carrier for the transportation of property by motor vehicle over the same route or within the same territory "unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in the Interstate Commerce Act * * *"

In *Gallot—Purchase—Holst*, 45 M. C. C. 1, 4 (1946) the Commission stated that this "prohibition is in recognition of the opportunity for discriminatory practices which is present when a carrier is authorized to offer both kinds of service to shippers." It went on to particularize certain types of such discrimination—ability of the shipper to obtain special treatment on his contract carrier traffic by assuring the dual carrier of certain traffic for transportation in common carrier service; ability of the dual carrier to obtain an undue advantage over competing common carriers by giving the shipper special treatment in contract operations; and ability of the dual carrier to accomplish what amounts to a rebate of part of its common carrier charges by agreeing to contract charges lower than it would otherwise accept.

The Commission has been diligent in enforcing this prohibition. See the cases cited in Hale & Hale, *Competition or Control, III: Motor Carriers*, 108 U. Pa. L. Rev. 775, 826, fn. 226 (1960). However, as the clear terms of the statute show, the prohibition is not absolute.[4] The

[4] Senator Wheeler, who was in charge of the bill, stated, 79 Cong. Rec. 5654 (1935) "There are instances in which both types of opera-

Commission here found that opportunities for discrimination were sufficiently foreclosed by insulating UPS' contract from its common carriage, not only by prohibiting common carriage from shippers utilizing contract carriage as consignors, as UPS had proposed, but also by prohibiting common carriage to such persons as consignees. UPS cites, in support of the Commission's action, *Complete Auto Transit, Inc.—Extension—Willow Run*, 71 M. C. C. 383, 387 (1957) and *Pacific Motor Trucking Co.—Extension—Oregon*, 71 M. C. C. 561 (1957). Protestants seek to distinguish these cases; the distinction asserted in regard to the *Complete* case is more persuasive than as to *Pacific*. Quite apart from Commission precedents, we are unable to see why the safeguards here imposed do not adequately protect against discrimination and consequently how we could say there was no sufficient basis for the Commission's finding that the proposed dual operations would be consistent "with the public interest and the national transportation policy declared in the Interstate Commerce Act."[5]

---

tion can advantageously be conducted by the same operator and without prejudice to the public interest, but the possibility of uses developing makes it advisable to give the Commission the power to pass on all cases in which it is proposed to combine the two types of operation."

[5] Protestants refer to the possibilities of unfair rate differentials resulting from the difficulty applicant would have in keeping records that would accurately reflect the costs of the two types of operation. However, this problem is inherent in any form of transportation where many different types of traffic are handled in the same vehicle or train of vehicles. Applicant maintains a formula for allocating costs to its various services, and the Commission's reservation of jurisdiction is adequate to enable the Commission to order special cost studies whenever these may be indicated.

III—Alleged Violations of Section 5

Protestants assert that the grant of a common carrier certificate to UPS would work a change in the character of UPS such as to require a § 5 (2) application by UPSA for approval of control of UPS in the latter's altered state, under the doctrine of *Pan American Airways Co.* v. *CAB*, 121 F. 2d 810, 814-16 (2d Cir. 1941); that there are two other unlawful control relationships in the UPSA family, of which more hereafter; and that the Commission could not lawfully issue a certificate to UPS under these circumstances.

The substance of these allegations was contained in a complaint filed after Division 1 had entered its order granting the UPS certificate and while petitions for reconsideration of that order before the full Commission were pending. At the same time a motion was made to stay all proceedings on the certificate application. On February 4, 1960, Division 1 denied the stay and, on March 2, 1960, Division 4 dismissed the complaint. A petition for reconsideration by the Commission of this order of dismissal is still pending. The Commission argues that, protestants having chosen to proceed in this manner, they are foreclosed from raising the same issues here. We shall not pass on this argument, for we think protestants' contentions fail on the merits.

Protestants' position runs counter to another portion of the *Pan American* opinion, where the Court of Appeals held, at p. 816, that the absence of an order approving the parent steamship company's control of the newly organized airline subsidiary, which the court found to be required, did not bar the issuance of a certificate to the subsidiary. This ruling would seem fully applicable to

the Motor Carrier Act on which, as is well known,[6] the Civil Aeronautics Act was modeled. Protestants assert that this holding in the *Pan American* case has been undermined by subsequent cases, notably *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). This could hardly be so as a matter of decision since *Marshall* was itself an acquisition of control and not a certificate case; and we can find no language in the Supreme Court's opinion that even deals with, much less reflects on, this portion of the *Pan American* decision. Indeed, the only recent pronouncement of the Supreme Court that we deem to have any bearing on the problem seems rather to support the holding in *Pan American*. In *American Trucking Associations* v. *United States*, 355 U. S. 141 (1957), the Court drew a distinction between the considerations governing the issuance of a certificate to a railroad-controlled truck line under §207 of the Motor Carrier Act, 49 U. S. C. §307, and those governing applications for approval of railroad control of a truck line under §5 (2)(b). The Court said, at p. 149, that "the legislative history of the Motor Carrier Act of 1935 gives no indication that §213 (a)(1), the predecessor of §5 (2)(b), was to be considered a limitation on applications under §207" and approved the Commission's practice of accepting "the policy of §5 (2)(b) as a guiding line, not as a rigid limitation" in interpreting §207.

Of course, the Commission would hardly issue a certificate under §207 when there had been a deliberate and serious flouting of the requirements of §5 (4) with respect to the very transportation concerned, and we need not decide whether the rule of the *Pan American* case

[6] See the concurring opinion of member Ryan on remand in *American Export Airlines, Inc.*, 3 C. A. B. 619, 627 (1942), and the supplemental opinion of the full Board on reargument, 4 C. A. B. 104, 107 (1943).

would go so far as to permit this. On the other hand, when the violation of §5 (4) has been due to excusable oversight or neglect, the Commission may well find that the public ought not be denied the advantages of the proposed service during any proceedings necessary for the rectification or removal of the illegal control; certainly the Commission should be able to do this when the alleged illegality concerns an area or a type of transportation unrelated to that for which a certificate is being sought. The seeming simplicity of §5 (2) veils complexities that have baffled not only the industry and the Commission but the Court. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), 355 U. S. 415 (1958). It would be absurd to hold that innocent failure to anticipate the course of administrative or judicial interpretation of the section necessarily worked a temporary outlawry, at the cost not only of the offender but of the public.

Of the three claims of illegal control made by protestants, the only one relating to the area in which applicant's operations were to be conducted was the claim that the new common carrier authority proposed to be conferred on UPS demanded a proceeding under §5 (2) for approval of additional control of UPS by UPSA.[7] No such approval was needed. Protestants' reliance on *Pan American Airways Co.* v. *CAB*, *supra*, and the decisions of the Commission applying that holding in motor carrier cases, is misplaced. The *Pan American* case dealt with acquisition of a subsidiary which had never been a carrier until it became one by the grant of a certificate; the Court of Appeals held there was no tenable basis for distinguishing between a case where a steamship company acquired all the stock of a company that was

[7] No prior approval of the UPS-UPSA relationship had been had or required since this antedated enactment of the Motor Carrier Act *Greyhound Meigers*, 1 M. C. C. 342, 352 (1936).

already a carrier, in which instance approval would clearly be required, and a case where a steamship company first acquired the stock of a company not engaged in any business and then made it a carrier. This is the principle that the Commission adopted in *M. J. Hannon —Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944), in which the controlling company became a carrier, and followed in *Schwerman Trucking Co.—Control —Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959), overruling *Smith—Control—Cement Transports, Inc.*, 75 M. C. C. 495 (1958). This principle applies only when a controlled or controlling person not theretofore a carrier first becomes one; it cannot logically be extended to require a new proceeding under §5 (2) whenever a carrier controlled by a person who has obtained approval or who was not required to obtain this because of grandfather status, expands its operations. Protestants do not seriously contend that new approval is needed when the expansion is by adding areas or commodities; we see no basis for a different rule when the expansion comes by adding contract or common carrier authority to a carrier that previously held only the other. This conclusion follows as a matter not only of good sense but of language and practice as well. Section 5 (2) relates to acquisition of control of a "carrier", 5(13) defines carrier so far as here relevant as "a motor carrier subject to Part II of this Title", and 203 (16) says that "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." In numerous cases the Commission has approved dual operation by a motor carrier controlled by a person who would be required by 5 (2) to obtain approval of a new acquisition of control of a motor carrier, see *Scott Bros., Inc.—Extension*, 34 M. C. C. 163 (1942); *Complete Auto Transit, Inc.—Exten-*

sion—Willow Run, 71 M. C. C. 383 (1957); *Pacific Motor Truck Co.—Extension—Oregon*, 71 M. C. C. 561 (1957); cf. *Rogers Cartage Co.—Extension*, 27 M. C. C. 276 (1941). In none has the Commission indicated that action under §5 (2) would be required.

The other two allegedly unlawful control situations concern operations unrelated to the areas here involved. Protestants claim that the Commission granted a 1938 application for a contract carrier permit for United Parcel Service of Pennsylvania, Inc., 10 M. C. C. 83 (1938), which thereby became a carrier for the first time, without the parent UPSA having applied for approval of control as was later held to be required when the Commission in the *M. J. Hannon* case, *supra*, adopted the rule of the *Pan American* case. If the Commission is concerned about this omission understandably made a score of years ago, §5 (7) affords a remedy; but this did not forbid the issuance of a certificate here, even if we assume that protestants have standing to raise the question. The other alleged illegality is that in proceedings wherein the Commission allowed United Parcel Service of Portland, Oregon, to purchase the operating rights of A. J. Wiese, 37 M. C. C. 473 (1941), and approved the acquisition of control of the Portland company by United Parcel Service of America, Inc., a Nevada corporation, UPSA, which owned all the stock of the Nevada corporation, did not join as an applicant, as *United States* v. *Marshall Transport Co.*, *supra*, later held it should. However, the Supreme Court has said in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 171 (1957), that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful. Even if the case were otherwise, the same considerations stated in connection with the Pennsylvania company would deprive the argument of effect here.

IV—Alleged Violation of §221 (b)

Section 221 (b) of the Motor Carrier Act, 49 U. S. C. §321 (b), says that "Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe * * *." Section 16 (5) directs that "Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law." The Commission's order denying reconsideration of the order of Division 1 granting the certificate, although dated February 4, 1960, was not served until February 24 or 25. The certificate was issued on March 9, effective immediately. Protestants urge that the certificate could not validly be made effective less than thirty days from the date of its issuance or, in the alternative, that it could not be issued in less than thirty days from what they claim to be the earliest possible effective date of the February 4 order, to wit, thirty days from the date of service, or March 25.

Protestants' first position requires little discussion. In *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 432 (1947), the Supreme Court held that the authorization in §315 (c) of the Interstate Commerce Act, 49 U. S. C. §915, to the Commission to "suspend, modify, or set aside its orders" with respect to water carriers "upon such notice and in such manner as it shall deem proper" did not authorize the Commission so to modify a certificate, the Court saying "That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act." On a parity of reasoning, assuming that the direction in

§221 (b) that an order shall not become effective in less than thirty days applies to an order granting a certificate, this means only that the certificate cannot become effective until the order has become effective, not that the certificate is itself an "order" and must contain still another thirty-day waiting period.

Protestants' alternative position is likewise unsound. We shall assume in protestants' favor, without deciding, that §221 (b) applies to orders granting certificates, as literally it surely does, despite the contrary view with respect to the corresponding provision, §15 (2), in Part I of the Interstate Commerce Act intimated in *Breswick & Co.* v. *United States*, 138 F. Supp. 123, 128 (S. D. N. Y. 1956), *reversed on other grounds*, *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). It would follow that the thirty-day requirement of §221 (b) applied to the June 3, 1959 order of Division 1 granting the certificate which, under §17 (4), had "the same force and effect * * * as if made or taken by the Commission." As a result of the applications for reconsideration by the full Commission and the stay granted by §17 (8), any time requirements with respect to effectiveness of that order have been amply fulfilled. Protestants say, however, that the order of February 4, 1960 denying reconsideration was itself subject to §221 (b) and could not become effective until thirty days after service. Assuming in protestants' favor, again without deciding, that the service requirement of §16 (5) is to be read into §221 (b), we think it would be undue literalism to construe §221 (b) as directing that an order which merely declares the Commission's unwillingness to review the action of one of its divisions, otherwise legally effective, and thereby terminates the stay of §17 (8), cannot become effective for thirty days. To be sure, permitting the order of a

division to become effective immediately on the denial of reconsideration by the full Commission may create problems with respect to judicial review, as was vividly illustrated in *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 136 (S. D. N. Y. 1955). However, to construe §221 (b) as compelling a delay of another thirty days in every case would present even worse problems. We believe Congress did not mean to impose any such shackles but rather to leave the matter to the Commission's good judgment.[8]

Even if we were to take a different view, it would not avail protestants. Section 10 (e) of the Administrative Procedure Act, 5 U. S. C. §1009 (e), directs that in judicial review of administrative action "due account shall be taken of the rule of prejudicial error." Protestants were not prejudiced by issuance of the certificate on March 9 rather than a fortnight later. They had two weeks between service of the Commission's order denying reconsideration and the issuance of the certificate, in which to initiate this action. In fact the complaint was filed on March 14, only five days after the certificate was issued. Neither Judge Palmieri in refusing a temporary restraining order nor we in denying an injunction have relied in any way on UPS' beginning to operate under a certificate which UPS knew was subject to challenge.

---

[8] Apparently the Commission's practice in this respect is not uniform. In *Seatrain Lines, Inc.* v. *United States*, 152 F. Supp. 619, 621 (D. Del. 1957), *aff'd per curiam* 355 U. S. 181 (1957), a Commission order denying reconsideration made the Division order effective 52 days thereafter. In *Consolidated Freightways, Inc.* v. *United States*, 176 F. Supp. 559, 561 (N. D. Cal. 1959), a Commission order denying reconsideration made the Division order effective 55 days thereafter.

Accordingly the requests for temporary and final injunctions are denied and the complaint dismissed.

Dated: New York, N. Y.

HENRY J. FRIENDLY
HENRY J. FRIENDLY
United States Circuit Judge

I concur

THOMAS F. MURPHY, D. J.
THOMAS F. MURPHY

I concur

EDMUND L. PALMIERI, D. J.
EDMUND L. PALMIERI

Judgment Entered 6/10/60
HERBERT A. CHARLSON
Clerk

Appendix B

INTERSTATE COMMERCE ACT:

Section 5 (49 U. S. C. Section 5):

"(2) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify

the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

* * * * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to ac-

complish or effectuate, or to participate in accomplishing or effectuating, the control, or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

* * * * *

"(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate."

* * * * *

Section 17(8) [49 USC Section 17(8)]:

"Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

* * * * *

Section 207 (49 U.S.C. 307):

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Section 210 (49 U.S.C. Section 310):

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operations for the transportation of property by motor vehicle over the same route or within the same territory, and

(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

* * * * * *

Section 221(b) [49 U.S.C. Section 321(b)]:

"Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

* * * * * *

Administrative Procedure Act:

Section 8(b) [5 U.S.C. Section 1007(b)]:

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such

exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * * * * *

Section 10(e) (5 U.S.C. Section 1009(e)):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of September, A. D. 1960.

No. MC-F-7321

YALE TRANSPORT CORP. ET AL.
(New York, N. Y.)

v.

UNITED PARCEL SERVICE OF AMERICA, INC., ET AL.
(New York, N. Y.)

It appearing, That, by order of the Commission, division 4, entered March 2, 1960, which order is hereby made a part hereof, the complaint under section 5(7) of the Interstate Commerce Act by Yale Transport Corp., Empire Carriers Corp., and Stone's Express, Inc., naming as defendants United Parcel Service of America, Inc., a Delaware holding company, not a carrier, and two wholly-owned subsidiaries of the Delaware company, United Parcel Service, Inc., formerly known as United Parcel Service of Cincinnati, Inc., and United Parcel Service, Inc., formerly known as United Parcel Service of New York, Inc., motor carriers, listing other subsidiaries and affiliates of the Delaware company, of which United Parcel Service of Pennsylvania, Inc., and United Parcel Service of Portland, Inc., herein called the Pennsylvania and the Portland companies, respectively, are motor carriers, and alleging violations of section 5(4) of the act as specified in the complaint, was dismissed:

It further appearing, That by petition dated March 31, 1960, complainants seek reconsideration of the order of March 2, 1960, and request oral argument; and that defendants have replied;

And it further appearing, (1) That the transaction presented under section 5 of the act in *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473 (1941), involving as party vendee the Portland company, was approved and authorized before the decision in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), and (2) that the Pennsylvania company was granted a permit as a contract carrier by motor vehicle in *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938), as supplemented in 20 M. C. C. 799 (1939) and 22 M. C. C. 243 (1940), prior to the decision in *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); and that institution of an investigation under section 5(7) of the act, or to find merit in the complaint, based on retrospective application of the principles stated in the *Refiners* and *Hannon* cases, would be unreasonable, *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, cf. *Yale Transportation Corp. et al.* v. *United States et al.*, (60 Cv. 1945) F. Supp., filed June 10, 1960; that no facts or substantial argument has been advanced by petitioners that warrants reconsideration; and that oral argument is unnecessary.

It is ordered, That the petition be, and it is hereby denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 14 1961
JAMES R. BROWNING, Clerk

No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1960

YALE TRANSPORT CORP., ET AL., APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ARCHIBALD COX,
Solicitor General,
W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General,
RICHARD A. SOLOMON,
DONALD L. HARDISON,
Attorneys,
Department of Justice, Washington 25, D.C.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

INDEX

	Page
Statement	1
Argument	3
Conclusion	10

CITATIONS

Cases:

Breswick & Co. v. *United States*, 138 F. Supp. 132	7
Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396	7
Hannon-Control-Hannon Motor Lines, Inc., 39 M.C.C. 620	7
Pan American Airways Co. v. *Civil Aeronautics Board*, 121 F. 2d 810	7
Railway Express Agency v. *United States*, 153 F. Supp. 738, affirmed, 355 U.S. 270	2
United Parcel Service of Pennsylvania, Inc., Contract Carrier Application, 10 M.C.C. 83	7
United Parcel Service of Portland—Purchase—A. J. Wiese, 37 M.C.C. 473	7
United States v. *Marshall Transport*, 322 U.S. 31	4, 7

Statutes:

Administrative Procedure Act, Section 10(e), 5 U.S.C. 1009(e)	9
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:	
Section 5	4, 5, 6
Section 5(2)	3, 4
Section 5(7)	3
Section 207(a)	1
Section 210	4
Section 221(b)	9
28 U.S.C. 2284, 2325	1

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 584

YALE TRANSPORT CORP., ET AL., APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 10, 1960, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. The Commission's order had granted the application of United Parcel Service, Inc., ("UPS") for a certificate of public convenience and necessity, pursuant to Section 207(a)

of the Interstate Commerce Act (49 U.S.C. 307(a)), authorizing common carriage of small packages by motor vehicle over irregular routes emanating from New York City and Boston (J.S. 4). Noting that UPS is one of several operating companies, under the common control of United Parcel Service of America, Inc. ("UPSA"), a non-carrier Delaware corporation, which have long held interstate contract carrier permits, the Commission, after full administrative proceedings, found that the operation proposed by UPS, like similar service already provided by it in its intrastate operations[1] "is designed for the handling of large volumes of small packages in a faster, more efficient and more economical service than provided by United States parcel post service, but at rates much the same as for parcel post service" (79 M.C.C. 629, 634). The Commission stated further that the proposed service "differs considerably from operations of existing carriers" (*id.* at 652) and of parcel post because it will be characterized by daily pickups, next-day delivery, signed receipts, automatic insurance and automatic return of undelivered packages (*id.* at 649).

Appellants appeared throughout the Commission proceeding in opposition to a grant of authority. They did not contend, however, at any stage of the hearings, that the Commission could not act because UPSA was not a party to the application, or because

[1] The operations being conducted by UPS under the certificate granted in this case are like those authorized in 1957 in a case involving a UPSA subsidiary in the Chicago area. See *Railway Express Agency* v. *United States*, 153 F. Supp. 738 (S.D. N.Y.), affirmed, 355 U.S. 270.

UPSA was illegally in control of other carrier subsidiaries. On August 25, 1959, nearly three years after the application was filed by UPS, and while petitions for reconsideration of the Division order were pending, the appellants filed a complaint with the Commission, pursuant to Section 5(7) of the Act (49 U.S.C. 5(7)), alleging the existence of unlawful control relationships in the UPS family in violation of Section 5(2) of the Act. At the same time, appellants moved to stay the application proceeding pending determination of their complaint. On February 4, 1960, the full Commission denied petitions for reconsideration in the application proceeding and dismissed the motion to stay. On March 2, 1960, the Commission, Division 4, dismissed appellants' complaint,[2] and on March 9, 1960, the certificate was issued, effective immediately.

On March 14, 1960, the present action was instituted to set aside the Commission's order of February 4, 1960. The district court unanimously sustained the Commission's findings and order.[3]

ARGUMENT

1. Appellants state that the "principal questions" raised by their appeal relate to control of UPS. In

[2] On September 9, 1960, a petition for reconsideration of the order dismissing the control complaint was denied (J.S. 51–52). Contrary to any implication in appellants' brief (p. 7, n. 1), the August 25, 1959 complaint, the Commission's order of February 4, 1960, dismissing the motion for a stay, and the Division 4 order of March 2, 1960, dismissing the complaint, were in the record below, which has been certified to this Court.

[3] The court's opinion and the relevant statutory provisions are appended to the jurisdictional statement.

our view, there is no real or substantial issue on this subject.

A. Appellants argue that the Commission should not have approved the grant of added operating authority to UPS until it determined, in the separate proceeding later instituted by appellants under Section 5, whether it should approve the "new control relationship" between UPSA and UPS.

The short answer is that Section 5 has no direct application to the relationship between UPSA and UPS and that no Section 5 approval was required.[4] UPS was a carrier prior to 1935, the effective date of the Motor Carrier Act, and it was controlled by UPSA prior to that date. Continuance of the existing relationship did not, as appellants concede (J.S. 5), require Commission approval and, contrary to appellants' suggestion, the grant of additional operating authority (authority to perform common, as well as contract, carrier service) to an existing subsidiary does not sustain the conclusion that the parent is acquiring a new carrier subsidiary.[5] As Circuit Judge Friendly stated below (J.S. 39):

---

[4] Section 5(2) requires Commission approval before any carrier or parent of a carrier acquires control of a new carrier. See *United States* v. *Marshall Transport*, 322 U.S. 31.

[5] The addition of common carrier authority to the existing contract carrier authority of UPS did raise a "dual operations" question within the meaning of Section 210 of the Interstate Commerce Act, 49 U.S.C. 310. But this section expressly authorizes such dual operations where the Commission, "for good cause shown," finds they are consistent with the public interest and the National Transportation Policy. The Commission so found. Also, it imposed conditions precluding UPS from providing common carrier service to or from persons utilizing its

> * * * Protestants do not seriously contend that new approval is needed when the expansion is by adding areas or commodities; we see no basis for a different rule when the expansion comes by adding contract or common carrier authority to a carrier that previously held only the other. This conclusion follows as a matter not only of good sense but of language and practice as well. Section 5(2) relates to acquisition of control of a "carrier," § 5(13) defines carrier so far as here relevant as "a motor carrier subject to Part II of this Title", and § 203(16) says that "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." In numerous cases the Commission has approved dual operation by a motor carrier controlled by a person who would be required by § 5(2) to obtain approval of a new acquisition of control of a motor carrier, * * *.

It is unnecessary to argue that the economic policies underlying Section 5 cannot be relevant in the case of an existing subsidiary seeking additional operating authority. We assume that they may be relevant, in a particular case, in determining whether it is in the public interest to permit the controlled carrier to expand or to alter its operations. However, during the entire course of the protracted application proceedings, appellants never attempted to show that grant of the application would not be in the public interest for reasons stemming from the fact that the applicant was a member of the United family. In-

---

contract carrier service, thus avoiding the possibility of discrimination or rebating.

stead, appellants, some three years after the application proceeding was instituted, filed a separate proceeding in which they complained, *inter alia*, that there was a formal violation of Section 5 insofar as it was proposed to give added authority to UPS.[6] As observed above, this charge is without foundation; Section 5, as such, is inapplicable to the control of UPS by UPSA.

B. Appellants also charged in their Section 5 complaint that there had been a failure to obtain requisite Commission approval in two other "control" situations: (1) an instance in which a Pennsylvania subsidiary of UPSA became a carrier for the first time, and (2) an instance in which an Oregon subsidiary of UPSA purchased the operating rights of an existing carrier. These discrete matters, which do not in any way involve the transportation here in question, would, we assume, have relationship to the instant case if it might be said that UPSA was thereby shown to be a wilful law violator and that UPS's qualifications for the grant of authority in New York were thereby tainted. It is plain, however, that the failure of UPSA to join in the applications filed by its subsidiaries in the Oregon and Pennsylvania matters was entirely consistent with the Commission's practice at that time and the view of the law which then prevailed.[7] But see the sub-

[6] To date, appellants have not sought review of the adverse decision of the Commission in the Section 5 proceeding.

[7] It should be noted that the Commission authorizations to the UPSA subsidiaries in these cases was made with express recognition of the fact that they were controlled by UPSA.

[footnote continued]

sequent decisions in *United States* v. *Marshall Transport*, 322 U.S. 31; *Hannon-Control-Hannon Motor Lines, Inc.*, 39 M.C.C. 620; cf. *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (C.A. 2). "It would be absurd," the court below stated (J.S. 38), "to hold that innocent failure to anticipate the course of administrative or judicial interpretation of the section [Section 5] necessarily worked a temporary outlawry, at the cost not only of the offender but of the public."

2. Appellants also urge that the Commission's "public convenience and necessity" findings were improperly "based upon the alleged desire of shippers for lower rates and upon the conjecture that United could operate profitably at its proposed low level of rates" (J.S. 17–18), and that the Commission "incorrectly found that no one protestant carrier could provide all the service proposed by United" (J.S. 19). A second review of questions of this kind is not required. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. In all events, the Commission's findings are fully supported by the record.

Thus, appellants have confused the interest of shippers in lower rates with an assumption that this factor alone was responsible for their endorsement

---

See *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M.C.C. 83; *United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M.C.C. 473, 474; cf. *Brewick & Co.* v. *United States*, 134 F. Supp. 132, 145 (S.D.N.Y.) ("[T]he I.C.C. could not have made a finding of control without approving control * * *").

of the application and for the Commission's subsequent approval. The facts are to the contrary; the Commission's decision makes clear that the shippers' concern for cost considerations was merged with their need for "completely modernized transportation" offered at "a minimum cost" (79 M.C.C. at 652–653). As the three-judge court pointed out (J.S. 32), this interest in the service aspects of the UPS proposal is not negatived by testimony of some of the shippers that the UPS service would lose its attractiveness if its rates were substantially higher than parcel post.

Nor is it true that "there was not an iota of evidence that [UPS] could operate at the level of rates proposed" (J.S. 18). As the court below stated (J.S. 32–33), the general testimony by UPS as to the profitable nature of a number of its common carrier operations and as to its experience in the transportation of small packages was supplemented by specific testimony that in 1956 the UPS intrastate operation in New York, utilizing rates similar to those proposed, produced a profit of $76,066 on operating revenues of $2,016,680—a ratio approximating that applicable to its total business in that year.

Finally, the court was clearly correct in upholding the Commission's findings that UPS would provide an overall service significantly better than that otherwise available. As the court observed (J.S. 31), the record showed that, although some of the existing motor carriers "have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete."

3. Appellants' final contention is that the Commission's order of February 4, 1960, denying their petitions for reconsideration, was improperly made effective within a lesser period than the 30-day minimum specified in Section 221(b) of the Act, because it was not served upon appellants until February 25, 1960, and the certificate was issued, effective immediately, on March 9, 1960. The district court, however, was unwilling to assume that the section applied not only to an order granting a certificate, but also to a subsequent order denying reconsideration.

In all events, the point, as it arises here, is of no more than academic interest. As the district court noted (J.S. 43):

> [Appellants] had two weeks between service of the Commission's order denying reconsideration and the issuance of the certificate, in which to initiate this action. In fact the complaint was filed on March 14, only five days after the certificate was issued. Neither Judge Palmieri in refusing a temporary restraining order nor we in denying an injunction have relied in any way on UPS' beginning to operate under a certificate which UPS knew was subject to challenge.

Since appellants' right to obtain full judicial review of the Commission's order was nowise impaired, there is no basis for a claim of prejudicial error. See Administrative Procedure Act, Section 10(e), 5 U.S.C. 1009(e).

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.
RICHARD A. SOLOMON,
DONALD L. HARDISON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission.

FEBRUARY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

FILE COPY

Office Supreme Court, U.S.
FILED
FEB 15 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 584.

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Plaintiffs-Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervening Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

UNITED PARCEL SERVICE, INC.,

Intervening Defendant-Appellee.

On Appeal From the United States District Court for the Southern District of New York.

MOTION TO AFFIRM.

IRVING R. SEGAL,
1719 Packard Building,
Philadelphia 2, Pennsylvania.

S. HARRISON KAHN,
1110-14 Investment Building,
Washington 5, D. C.,
Of Counsel.

BERNARD G. SEGAL,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Attorney for Intervening Defendant-Appellee.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
STATEMENT	2
ARGUMENT	8
1. The Commission Properly Refused to Withhold the Certificate Pending Determination of Appellants' Complaint Filed Under Section 5	8
2. There Was No Violation of Section 221(b)	13
3. The Commission's Detailed Findings of Convenience and Necessity and of Fitness and Ability Are Fully Supported	15
4. The Authorization of Dual Operations Under Section 210 Was Proper	18
CONCLUSION	19

TABLE OF CASES CITED.

Page

Callahan Road Improvement Co. v. United States, 345 U. S. 507 (1953) 13

Commissioner v. South Texas Lumber Co., 333 U. S. 496 (1948) 15

Greyhound Mergers, 1936, 1 M. C. C. 342 10

Pan American Airways Co. v. Civil Aeronautics Bd., 121 F. 2d 810 (2d Cir. 1941) 11

Railway Express Agency, Inc. v. United States, 355 U. S. 270 (1957), affirming per curiam 153 F. Supp. 738 (S. D. N. Y. 1957) 2, 12, 16

Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas, 80 M. C. C. 382 (1959) 10, 11, 12

United Parcel Service of Pennsylvania, Inc., Contract Carrier Application, 10 M. C. C. 83 (1938) 12, 13

United Parcel Service of Portland—Purchase—A. J. Wiese, 37 M. C. C. 474 (1941) 10, 12

United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299 (1927) 14

United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 (1946) 18

Venner v. Michigan Central R. R., 271 U. S. 127 (1926) 13

TABLE OF STATUTES CITED.

Page

Interstate Commerce Act:

Section 5, 49 U. S. C. § 5 ..... 4, 5, 8, 9, 10, 11, 12, 13

Section 5(7), 49 U. S. C. § 5(7) 9

Section 17(4), 49 U. S. C. § 17(4) 14

Section 17(8), 49 U. S. C. § 17(8) 14

Section 17(9), 49 U. S. C. § 17(9) 14

Section 203(16), 49 U. S. C. § 303(16) 12

Section 210, 49 U. S. C. § 310 ..... 6, 18, 19

Section 221, 49 U. S. C. § 321 ..... 13, 15

Section 221(b), 49 U. S. C. § 321(b) 6, 7, 13

Judicial Code:

Sections 2284, 2325, 28 U. S. C. §§ 2284, 2325 2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 584.

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. AND STONE'S EXPRESS, INC.,
Plaintiffs-Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,
Intervening Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

UNITED PARCEL SERVICE, INC.,
Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervening Defendant-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from a final judgment entered pursuant to the unanimous opinion of a three-judge court, constituted pursuant to 28 U. S. C. §§ 2284, 2325, refusing to set aside an order of the Interstate Commerce Commission pursuant to which a certificate of public convenience and necessity had been granted to Intervening Defendant-Appellee, United Parcel Service, Inc. (herein "UPS")..

This certificate authorized UPS to render a unique package delivery service which has already been fully described to this Court in an appeal from an earlier decision of the same district court involving a different territory. **Railway Express Agency, Inc. v. United States**, 355 U. S. 270 (1957), *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957).

The instant proceeding began with the application of UPS to the Interstate Commerce Commission for a certificate to operate as a common carrier by motor vehicle of general commodities, with certain exceptions including weight and size restrictions, from the New York City metropolitan area and from the Boston metropolitan area to all points in a territory embracing the states of Connecticut, Rhode Island and Massachusetts and parts of New Jersey, New York, Vermont, New Hampshire and Maine (the latter three states to be served only from the Boston origin area).

After 49 days of hearings, on a record of over 7000 pages and 550 exhibits, the Examiner issued his proposed report, following which exceptions, and briefs thereon, were filed by the parties. Thereafter, on June 3, 1959, upon consideration of the exceptions to the Examiner's report, the Commission, by Division 1, issued its report and order granting the authority to UPS which is here challenged. 79 M. C. C. 629-663. In its comprehensive report, the Commission, after fully discussing the several exceptions to the Ex-

aminer's proposed report, made the following ultimate findings (79 M. C. C. at 657):

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, between, from, and to the points, and in the manner and subject to the restrictions and conditions as described in appendix C hereto; that applicant is fit, willing, and able, properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that an appropriate certificate should be issued; and that the application in all other respects should be denied.
>
> "We further find that the holding by applicant of the certificate herein granted and the holding by it and its affiliates of the permits heretofore issued to them, will be consistent with the public interest and the national transportation policy."

At that late stage in the proceeding, certain of the appellants for the first time sought to inject into the case, by two related maneuvers, an alleged question of unlawful control in the United Parcel Service family. First, on August 21, 1959, these appellants sought to defeat the issuance of the certificate by moving for a stay of the proceedings until the alleged question of unlawful control had been determined. Then, on August 25, 1959, these appellants filed a complaint with the Commission in Docket No. MC-F-7321 alleging that UPS (a New York corporation), its parent United Parcel Service of America, Inc. (herein "UPSA"), and an affiliated carrier, United Parcel Service,

Inc. (an Ohio corporation), were in violation of section 5 of the Interstate Commerce Act.[1]

The full Commission, on February 4, 1960, dismissed the motion for a stay of these proceedings, and at the same time overruled and denied all petitions for reconsideration of its order of June 3, 1959.

On March 2, 1960, upon defendants' motion, the Commission, by Division 4, dismissed the complaint in Docket No. MC-F-7321. On September 9, 1960, the full Commission denied appellants' petition for reconsideration of its dismissal of the complaint (J. St. 51-52). No appeal was taken from that action of the Commission. Consequently, the control relationships in the United Parcel Service family stand fully and finally vindicated and approved on the merits **in a section 5 proceeding** instituted by three of the appellants—a **control proceeding** in which they raised by direct attack all of the same contentions they would now collaterally raise before this Court **in a certificate case.**

The certificate authorized by the order dated June 3, 1959 (petitions for reconsideration and stay of which were dismissed by order dated February 4, 1960) was issued on March 9, 1960. UPS thereupon commenced full operations as permitted and required by the certificate.

---

[1] Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, provides *inter alia:*

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof * * *. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. * * *"

On March 15, 1960, appellants instituted the present action in the United States District Court for the Southern District of New York, seeking to have set aside and enjoined the Commission's order of February 4, 1960, and seeking to have the certificate declared null and void. In this action, appellants did not deny that there is an almost unlimited number of manufacturers, wholesalers and commercial shippers generally engaged in inter-business distribution, having places of business in the New York and Boston origin areas, who were using United States parcel post as their normal transportation medium for small package shipments. Appellants further did not challenge the Commission's finding that parcel post service falls far short of meeting the business needs of these small package shippers (79 M. C. C. at 651). Finally, appellants did not challenge the finding that the service rendered by UPS is far superior to parcel post in all respects, and removes the problems and service deficiencies of parcel post of which so many manufacturers and other wholesalers so earnestly complain. 79 M. C. C. at 649.

Rather, appellants directed their principal attack against the Commission's order on technical and collateral issues.

First, appellants asserted that there was a control relationship between UPS, UPSA and affiliated carriers which had not been approved under section 5 of the Interstate Commerce Act, and that such approval was a condition precedent to the granting of a certificate in this case.

By its order of February 4, 1960, denying the motion for a stay, the Commission determined that the resolution of any question of a possible improper control relationship in the United Parcel Service family is not a condition precedent to the issuance of a certificate in this case. Furthermore, by its order of March 2, 1960, dismissing appellants' section 5 (control) complaint in Docket No. MC-F-7321, and its order of September 9, 1960, denying reconsideration of that order, the Commission has found that there is no

unlawful control relationship among the members of the United Parcel Service family (J. St. 51-52).

As a second procedural attack on the order of the Commission denying reconsideration in this proceeding, appellants argued that the order and the certificate were allegedly made effective too soon in violation of section 221(b) of the Interstate Commerce Act, 49 M. C. C. § 321(b).

Appellants also made the usual attack against the Commission's exercise of its traditional fact finding function, asserting that there was not substantial evidence to support the Commission's findings of fact (1) that the respective services of appellants and other protestants below do not provide a reasonable and practical alternative to parcel post, so that there is need for the service of UPS, and (2) that UPS' service will not divert so much business from appellants and the other protestants as to impair their operations and deprive the public of their services.

Finally, appellants asserted that the Commission also erred in concluding, pursuant to the broad authority delegated to it by section 210 of the Act, 49 U. S. C. § 310, that the holding by UPS of both a common carrier certificate and a contract carrier permit, subject to the conditions imposed, would be consistent with the public interest and with the national transportation policy.

The three-judge statutory court below, in a detailed and well reasoned opinion by Circuit Judge Friendly, reported at 185 F. Supp. 96, unanimously dismissed the complaint (J. St. 23-44), holding that:

1. The findings of fact of the Commission, with respect both to convenience and necessity and to fitness and ability, were supported by substantial evidence on the whole record (J. St. 30-33).

2. With the additional restrictions imposed by the Commission on the authority granted to UPS, the Commission properly exercised its discretion under section 210 of the Act in finding that the proposed dual operations would be

consistent with the public interest and the national transportation policy (J. St. 34-35).

3. There was no unlawful control relationship in the United Parcel Service family which would bar the issuance of a certificate to UPS (J. St. 36-40).

4. Appellants' contentions that the certificate was issued too soon in violation of section 221(b) of the Act were without merit (J. St. 41-43).

ARGUMENT.

The unanimous decision of the court below, approving the issuance of a motor carrier certificate of public convenience and necessity to UPS after lengthy proceedings before the Commission and a full presentation of all contentions before the court, is clearly correct under the provisions of the Interstate Commerce Act, the governing case law, and long established administrative practice.

1. The Commission Properly Refused to Withhold the Certificate Pending Determination of Appellants' Complaint Filed Under Section 5.

In this appeal, appellants seek to set aside the grant of a certificate of public convenience and necessity. But appellants' principal attack is not directed against the findings which form the basis of the Commission's grant of the certificate. Rather, appellants' main argument is that the three-judge court below erred in upholding the Commission's refusal to grant appellants' motion requesting a stay of all proceedings herein until asserted improper control relationships allegedly existing between members of the United Parcel Service family were investigated and their propriety determined by the Commission.

These same allegations of allegedly unlawful control were directly raised in a complaint proceeding, and have now been finally rejected by the Commission in Docket No. MC-F-7321 (see note 2 at pp. 9-10 below, and J. St. 51-52). Appellants' failure to appeal the Commission's decision on the merits in that complaint proceeding, where the control issues are directly raised, is entirely inconsistent with appellants' position in this certificate case, where the asserted control questions are at best only collateral issues. Having abandoned their direct action, appellants nevertheless press their collateral attack in this court following its rejection by a unanimous three-judge court below.

Appellants' only allegation of unlawful control with respect to UPS or the territory embraced in this proceeding is that the acquisition by UPS, a contract carrier, of additional common carrier authority—as a result of the Commission's action in this case—constitutes the acquisition of a new "carrier" by its parent, UPSA. Appellants then argue from this proposition that the certificate could not be lawfully issued to UPS until such acquisition has been approved in a control proceeding prosecuted under section 5 of the Interstate Commerce Act, 49 U. S. C. § 5. In addition, appellants go beyond the grant of authority to UPS in this case by attacking, as unlawful, intercorporate relationships which have existed for as long as 20 years between UPSA and other affiliated companies in the United Parcel Service group of carriers.

Significantly, these asserted control issues were never mentioned until August 21, 1959, nearly three years after UPS' application was filed and nearly three months after the order of the Commission was issued granting the requested authority. At that late date, appellants filed a motion with the Commission for a stay of proceedings pending action on a complaint against UPS, UPSA and an affiliated Ohio corporation which appellants intended to file under section 5(7) of the Interstate Commerce Act, 49 U. S. C. § 5(7). The complaint, docketed in No. MC-F-7321, was later filed on August 25, 1959, more than two years after a full disclosure of the entire corporate relationship between UPS, UPSA and other affiliated carriers had been made in the hearings in this case (79 M. C. C. at 632-634).

The control issues thus raised by appellants were obviously an afterthought. There was no substance to the charges made in the complaint and, on motion of the defendants named therein, the Commission dismissed the complaint.[2] In so doing, and later on September 9, 1960, in

---

2. In its order of March 3, 1960, dismissing the complaint in Docket No. MC-F-7321, the Commission found as follows: "That control of the defendant motor carriers in a common

denying reconsideration of its order dismissing the complaint (J. St. 51-52), the Commission found that the control of UPS in a common interest with other United Parcel Service companies was not in violation of section 5, and that institution of an investigation into the allegedly improper control relationship between UPSA and other subsidiary carriers would be unreasonable.

That determination by the Commission, in a complaint proceeding in which the control questions were directly raised and considered, demonstrates the unsupportability of appellants' contentions here.

Wholly independent of the Commission's action in the control proceeding, the court below also considered appellants' claims of illegal control and found them completely without merit. Moreover, the court upheld the Commission's position that determination of the propriety of the control relationships was not a condition precedent to the grant of a certificate to UPS. The court thus concluded—as did the Commission in the section 5 proceeding—that there is no unlawful control relationship in the United Parcel Service family which requires approval by the Commission (J. St. 38-40).

If it be assumed, *arguendo*, that the acquisition of the certificate by UPS in this case invoked section 5, even then appellants' motion to stay these proceedings would not be

---

interest preceded the effective date of the Motor Carrier Act, 1935, and did not require approval of the Commission, *Greyhound Mergers*, 1936, 1 M. C. C. 342, 352; that no change in the control is alleged, except the change in form approved and authorized in *United Parcel Service of Portland-Purchase-Wiese*, 37 M. C. C. 473; that each of the defendant motor carriers holds authority to operate as a contract carrier and none has or would become a carrier for the first time as a result of the granting of authority to operate as a common carrier, distinguishing *Schwerman T. Co. —Control—Schwerman T. Co., of Texas*, 80 M. C. C. 382; that the granting of additional rights to an existing carrier, whether of the same type or a different category from those previously held, is not the acquisition of control of 'another carrier' within the meaning of section 5(2) [citing five cases]."

justified, for, as Judge Friendly pointed out in his opinion for the court below, **Pan American Airways Co. v. Civil Aeronautics Bd.**, 121 F. 2d 810 (2d Cir. 1941), teaches that the certificate could issue before a control proceeding is held (J. St. 36-38). But this issue does not arise here, since appellants' allegations with respect to UPS do not present any section 5 question in the first place.

A brief examination of appellants' contentions with respect to alleged violations of section 5 will show why the Commission was correct in refusing to grant a stay in this case, why the court below was correct in rejecting appellants' attack under section 5, and why appellants' arguments present no substantial question to this Court.

Appellants concede that because UPS holds contract carrier rights under the "grandfather" provision of the Interstate Commerce Act, and control by the same non-carrier parent existed prior to the enactment of Part II of that Act, approval of continued control of UPS by UPSA was not required under section 5 of the Act (J. St. 5-6). However, appellants seek to circumvent this accepted rule by the contention that when a contract motor carrier, such as UPS, first acquires common motor carrier rights, it somehow thereby becomes a new "carrier," therefore requiring a control application under section 5 before the common carrier certificate may be granted.

Both the Commission and the court below found this contention utterly lacking in merit. Appellants' only alleged authority for their proposition is **Schwerman Trucking Co. —Control—Schwerman Trucking Co. of Texas**, 80 M. C. C. 382 (1959). But that case involved a grant of new operating authority as a contract carrier to a corporation which previously had held neither contract nor common carrier rights; it had held no carrier rights whatever. **Schwerman** certainly is not applicable here, merely because common carrier authority was granted to UPS, which was **already a carrier** by virtue of its previously held contract carrier permit. **Schwerman** is so clearly distinguishable from the

present situation that no construction or interpretation is needed for this purpose. But beyond the decision itself, the Commission has unequivocally stated that its own decision in **Schwerman** is wholly inapplicable here (see note 2 at pp. 9-10 above). Certainly the Commission's statement as to the meaning of its own decision in **Schwerman** is a persuasive answer to the attempt by appellants to read an utterly unsupportable meaning into that decision.

Appellants' contention that the Commission, in applying section 5, should distinguish between **kinds** of operating rights completely departs from precedent and logic. Under the Interstate Commerce Act, by explicit definition (section 203(16), 49 U. S. C. § 303(16)), a carrier is a carrier, regardless of its size, the extent of its rights, or the number of extensions of rights in the form of additional certificates and permits it may acquire. As the court below held, being a carrier by statutory definition since 1939, UPS could not **become** a carrier upon acquisition of the certificate here involved (J. St. 39-40). Hence, section 5 is not pertinent to the grant of this certificate to UPS.

Appellants' allegation of improper control with respect to the Ohio affiliate of UPS, which is based upon an earlier certificate case, is identical with the contention made here with respect to UPS, and is invalid for the same reason. There, as in this case, a contract carrier later acquired common carrier rights (in a proceeding that found its way to this Court which affirmed the grant of the certificate—**Railway Express Agency, Inc. v. United States**, *supra*, 355 U. S. 270 (1957). There, as here, it is clear that the grant of additional carrier authority to an existing carrier does not invoke section 5 of the Act.

Appellants acknowledge that UPS' Portland affiliate is operating pursuant to an order of the Commission issued in 1941, **United Parcel Service of Portland—Purchase—A. J. Wiese**, 37 M. C. C. 474 (1941); and its Pennsylvania affiliate is rendering service pursuant to an order of the Commission issued in 1938. **United Parcel Service of Penn-**

sylvania, Inc. Contract Carrier Application, 10 M. C. C. 83 (1938).

These Commission orders stand unimpeached in any direct proceeding. Appellants' contention that these 1941 and 1938 orders should have been conditioned on the parent corporation's (UPSA) becoming a formal party in each of those proceedings represents an improper collateral attack on those orders. The Commission's ruling that the legality of those orders may not be tested here is squarely in accordance with the decisions of this Court. **Callanan Road Improvement Co. v. United States,** 345 U. S. 507 (1953); **Venner v. Michigan Central R. R.,** 271 U. S. 127, 130 (1926).

Appellants' position below was based solely on the refusal of the Commission to grant appellants' motion for a stay of these proceedings pending determination of the complaint filed by appellants under section 5. That determination has now been made in a final order of the Commission in Docket No. MC-F-7321 (J. St. 51-52). Appellants have taken no appeal from that order. The final rejection of these allegations on the merits should be conclusive of the invalidity of appellants' collateral attack here.

2. There Was No Violation of Section 221(b).

Appellants have raised another technical issue by contending that the "order" of the Commission denying reconsideration could not take effect for 30 days from the time it was served on appellants. For support, appellants rely on section 221(b) of the Interstate Commerce Act, 49 U. S. C. § 321(b), which provides that all "orders" of the Commission should take effect within such reasonable time, not less than 30 days, as the Commission may prescribe.

Appellants have pointed to no decisional precedent whatsoever, and we have found none, to support their strained construction of section 221. Clearly, the provision relied on by appellants applies only to those orders of the Commission which determine issues raised in the hearings.

The report and order of the Commission, by Division 1, issued on June 3, 1959, is such an order, and the elapsed time until the certificate was issued to UPS on March 9, 1960, plainly fulfills all requirements under the statute. The three-judge district court has here so held (J. St. 42), and appellants have failed to demonstrate any defect whatsoever in the court's reasoning and conclusion on this point.

As a reading of the Commission's order of February 4, 1960, confirms, the denial of the petition for reconsideration did not prohibit any action, nor did it, of itself, permit any action. It merely removed the automatic stay or postponement of the effective date of the order, which is imposed by section 17(8) of the Act, pending disposition of the petition for reconsideration.[3] The order of the division is the operative order of the Commission, as section 17(4) specifically provides:

> "* * * any order, decision or requirement of a division * * * shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission."

Section 17(9) provides that when an application for "reconsideration of any decision, order, or requirement of a division" shall have been denied, a suit to enjoin or set aside that decision, order or requirement may be brought in the proper court. This provision, read in conjunction with section 17(8), makes it clear that the right of appeal lies from the order of the division authorizing the grant of authority, which became effective and appealable by the denial of the petition for reconsideration.

Appellants' highly technical argument on this issue thus amounts to no more than a contention that the issuance of the certificate should have been delayed for about two

3. The fact that the Commission might denominate the denial of a petition for reconsideration an "order" does not, of course, determine its legal status under the review and other procedural provisions of the statute. **United States v. Los Angeles & Salt Lake R. R.**, 273 U. S. 299, 309 (1927).

weeks. Even assuming, *arguendo*, that appellants are correct in their construction of section 221, which is contrary to established Commission procedure,[4] and contrary to the reasoned decision of the court below, it could result now only in requiring the Commission to perform the vain and useless ministerial act of reissuing a certificate to UPS, the 30 day period claimed necessary by appellants having long since expired.

3. The Commission's Detailed Findings of Convenience and Necessity and of Fitness and Ability Are Fully Supported.

Appellants also challenge the findings of fact which form the basis of the Commission's grant of a certificate of public convenience and necessity to UPS. Significantly, appellants do not dispute the finding that the principal medium for small package shipments prior to inauguration of UPS service was parcel post, and that in many important respects parcel post service is unsatisfactory, inconvenient and inadequate for commercial shippers (79 M. C. C. at 648-649, 651). Nevertheless, appellants would have the Court ignore the admitted deficiencies of parcel post and assume that the sole attraction of UPS' service is its low rates. Appellants also make the unwarranted assumption, which is directly contrary to the evidence, that appellants provide "the same service which United proposed" (J. St. 19).

These arguments were fully met and disposed of by the Commission.[4] And the court below, in rejecting these contentions, concisely stated the facts as follows (J. St. 31):

> "The evidence of the shipper witnesses, painstakingly reviewed in the report of Division 1, shows that UPS was offering not simply a cheaper but a

4. An established administrative practice, especially one of long standing, is entitled to great weight in construing both the administrative regulation and the enabling statutory provision. **Commissioner v. South Texas Lumber Co.**, 333 U. S. 496 (1948).

better mousetrap. It was better than parcel post because of the pickup, assured delivery times, repeated attempts to effect delivery and other features mentioned above. It was better than any service offered by existing motor carriers because although some of these carriers may have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete. * * *"

These arguments of appellants here are the same as those which were rejected by this Court in 1957 in a case involving the grant of similar authority (from Chicago to all or parts of five midwestern states), on a comparable, though shorter, record, to the United Parcel Service company operating in that area. **Railway Express Agency, Inc. v. United States**, *supra*, 355 U. S. 270, *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957). Indeed, Railway Express Agency was also the appellant there, and it is pressing the identical claims here. In that earlier case, Circuit Judge Swan, speaking for the three-judge statutory court, disposed of these arguments as follows (153 F. Supp. at 741-742):

"* * * We think it apparent from the reports of the examiner and Division 1 that the certificate was granted to United Parcel on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers."

That statement is equally applicable and appropriate here.

Appellants further contend that UPS failed to prove its ability to operate its service "at the level of rates proposed" (J. St. 18). This contention is merely another attempt indirectly to attack the tariff of UPS. In the 1957 United Parcel Service case, this Court affirmed the court below which held that such a collateral attack may not be made in a certification proceeding. **Railway Express Agency, Inc. v. United States**, *supra*. As in that earlier

case, the contention here is founded on the erroneous assumption that the Commission based its findings solely on some specific proposed level of rates. In a careful review of the evidence by the court below, it demonstrated that this is not the fact (J. St. 32).

With regard to UPS' ability to perform the proposed service, appellants have wholly ignored the detailed basis for the Commission's finding on this subject set forth in its report by Division 1 and in the subsidiary findings of the Examiner.[5]

Thus, for example, the Commission found that UPS and its affiliates "are thoroughly experienced in the transportation of small packages and have developed efficient and economical methods for the handling of such traffic" (79 M. C. C. at 656). The Examiner found that at the time of the hearing, in the identical operation in "the restricted area in and around New York", UPS "is making daily pickups from 1,400 shippers and is handling a daily volume of almost 16,000 packages" (Examiner's report, p. 8). The court below calculated from figures in the Record that in these operations, which were performed at rates similar to those proposed in the new service, UPS earned, in 1956, a profit of $76,066, and realized a "return of some 19% before income tax on its equity and advances from an affiliate" (J. St. 33). The Examiner also set forth in detail the financial assets of UPS and the nature and extent of equipment to be utilized in the proposed service (Examiner's report, pp. 9, 12-13, 64). None of those findings has been challenged by appellants.

Appellants have not only ignored the findings on which the grant of the certificate was based, but have also made the unwarranted assumption that the court below did not properly exercise its function of review. It is well settled

---

5. The Commission adopted the facts stated by the Examiner (79 M. C. C. at 631); no exceptions were taken to those statements, and his report must therefore be considered together with the Commission's report.

that, since the order granting the certificate was within the Commission's statutory power, it may not be set aside unless it is clearly erroneous as a matter of law, or unsupported by any substantial evidence. **United States v. Pierce Auto Freight Lines, Inc.**, 327 U. S. 515, 535-536 (1946). Appellants do not deny that the ultimate findings required by law were explicitly made in terms of the statutory language. Furthermore, the comprehensive and careful report of the Commission clearly shows that full consideration was given to every fact made relevant by the applicable sections of the Interstate Commerce Act, and that the record of 7,021 pages and 550 exhibits, introduced in the course of 49 hearing days, contains ample evidence to support the findings.

The opinion below reflects an independent and diligent study by the court of the extensive record which presents convincing proof of the validity of the conclusions reached by the Commission.

4. The Authorization of Dual Operations Under Section 210 Was Proper.

Appellants also attack the order of the Commission on the ground that "In granting dual operating authority, the Commission made no finding that this would be consistent with the public interest and the National Transportation Policy nor was there any evidence adduced to support such a finding" (J. St. 21). Obviously, appellants overlooked the Commission's specific finding on this point (79 M. C. C. at 656):

> "• • • we conclude that the holding by applicant of the certificate sought and the holding by it and its affiliates of the permits heretofore issued to them will be consistent with the public interest and the national transportation policy."

The Commission reached this conclusion after consideration of voluminous evidence regarding the benefits

to the public resulting from the operation of both the contract carrier retail store delivery service and the proposed common carrier parcel delivery service of UPS. The Commission approved the requested dual authority, but only after it imposed a restriction in addition to the one proposed by UPS (79 M. C. C. at 655, 663). UPS had proposed that no service should be rendered under the certificate between department stores, specialty shops and retail stores, and their branches or warehouses, or between such stores, on the one hand, and, on the other hand, the premises of the customers of such stores. The Commission clearly was justified on the record in concluding that—with the addition of a further restriction against providing delivery service under the certificate to the premises of persons (department stores, specialty shops and retail stores) who are served as shippers by UPS pursuant to permits issued by the Commission—opportunities for discrimination are eliminated. In addition, the specific retention of jurisdiction by the Commission, a device frequently employed by the Commission in approving dual authority, provides a further and absolute safeguard (79 M. C. C. at 654-656).

Certainly the statute could not be more explicit in leaving approval of dual operations to the sound discretion of the Commission. Section 210, 49 U. S. C. § 310. In the light of the evidence and the restriction added by the Commission, there can be no possible question as to the propriety of the Commission's decision on this issue and the court below so held.

CONCLUSION.

The Commission in granting the certificate to UPS, and the court in sustaining that grant, have followed long standing and well recognized precedents. In refusing to accept any of appellants' novel departures from accepted practices and in determining in favor of UPS every issue advanced by appellants, the Commission and the court below acted under clear and established principles of law and practicality.

We respectfully submit, therefore, that appellants have not presented any substantial question for the decision of this Court, and the judgment of the court below should be affirmed.

BERNARD G. SEGAL,
Attorney for Intervening Defendant-Appellee.

IRVING R. SEGAL,
S. HARRISON KAHN,
Of Counsel.

FILE COPY

F. D
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants

RAILWAY EXPRESS AGENCY, INCORPORATED, BILGAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee

REPLY TO THE MOTIONS TO AFFIRM

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp. and Stone's Express, Inc., Appellants, and Railway Express Agency, Incorporated, Intervenor-Appellant,
Office & P. O. Address,
160 Broadway
New York 38, New York.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

INDEX

	PAGE
POINT I.—Important and novel questions are presented to this Court for review by this appeal. The motions to affirm erroneously present the facts and applicable law	2
POINT II.—The findings of fact are not supported by substantial and probative evidence	11
POINT III.—Sections 210 and 221(b) of the Interstate Commerce Act	14
CONCLUSION	15

CASES CITED

Allegheny Corp. v. Breswick & Co., 353 U. S. 151, 1 L. ed. 2nd 726 (1957)	8
Atlas Tack Corporation v. New York Stock Exchange, 246 F. 2d 311 (C. A. 1, 1957)	9
Greyhound Mergers, 1 M. C. C. 342 (1935)	6
M. J. Hannon—Control—Hannon Motor Lines, Inc., 39 M. C. C. 620 (1944)	5, 10
Leedom v. I. B. E. W., 278 F. 2d 237 (C. A. D. C. 1960)	9
Pan American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810 (C. A. 2, 1941)	10

PAGE

Pan America Bus Lines Inc., 1 M. C. C. 190 (1936) 11

Pregler Extension of Operations, 23 M. C. C. 691 (1940) 7

Railway Express Agency, Inc. v. United States, 153 F. Supp. 738, S. D. N. Y. (1957) aff'd per curiam, 355 U. S. 270 (1957) 10

Refiners Transport & Term. Corp.—Purchase—Marshall, 39 M. C. C. 271 (1943) 5

Schaeffer Transportation Co. v. United States, 353 U. S. 83 (1958) 13

Schwerman Trucking Co. — Control — Schwerman Trucking Co. of Texas, 80 M. C. C. 382 (1959) 10

Secretary of Agriculture, etc. v. United States, 347 U. S. 645, L. ed. 1015 (1954) 10

Superior Trucking Company, Inc.—Extension—Wisconsin, 77 M. C. C. 51 (1958) 13

United Parcel Service of Pennsylvania, Inc.—Contract Carrier Application, 10 M. C. C. 83 (1938) 5

United Parcel Service of Portland—Purchase—A. J. Wiese, 37 M. C. C. 474 (194) 5

United States v. Marshall Transport Co., 322 U. S. 31 (1944) 5, 8, 9

Yale Transport Corp., et al. v. United Parcel Service, Inc., et al., Docket No. MC-F-7321 4

STATUTES CITED

	PAGE
Interstate Commerce Act, 49 U. S. C. Section 1, et seq.	2, 3, 4, 6, 8, 9, 10, 11, 14, 15
Interstate Commerce Act, Part II	7
Pub. L. 85-163, Sections 1(1), 2, 71 Stat. 411	7
Administrative Procedure Act [5 U. S. C. Section 1009(e)]	13

AUTHORITY CITED

70th Annual Report of the Interstate Commerce Commission (1956)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO THE MOTIONS TO AFFIRM

Appellants and Intervenor-Appellant, Railway Express Agency, Incorporated (herein collectively called "Appellants"), respectfully submit this brief, pursuant to Rule

16(3) of the Revised Rules of the Supreme Court of the United States, in reply to the motions to affirm filed by Appellees and Intervenor-Appellee (herein called "Intervenor" or "U. P. S.").

POINT I

Important and novel questions are presented to this Court for review by this appeal. The motions to affirm erroneously present the facts and applicable law.

The Appellees' brief only misconstrues the governing law; Intervenor's clever brief tortures the facts and unfortunately misstates the law.[1] Intervenor's technique consists in manufacturing a forensic lily and then gilding it.

In short, this appeal involves novel and important questions concerning the interrelationship among various sections of the Interstate Commerce Act (herein called the "Act") (49 U. S. C. Section 1 *et seq.*) which have not heretofore been decided by this Honorable Court. The vital issues presented materially affect significant areas of motor carrier regulation and involve an appraisal of the National Transportation Policy.

Contrary to the statement of Appellees and Intervenors' (App. Brf., 4; Int. Brf., 10), the issue involved is not whether the Interstate Commerce Commission (herein called the "Commission") should disapprove a control relationship between U. P. S. and its parent, United Parcel Service of America, Inc. (U. P. S. A.) which existed prior to 1935, but whether the illegal control rela-

[1] Appellees' motion and Intervenor's motion will be referred to under the symbols (App. Brf.) and (Int. Brf.) respectively, followed by a page number.

tionship which, concededly, was created by U. P. S. A. and its subsidiaries, including U. P. S., subsequent to 1935 required that a Section 5 application (49 U. S. C. §5) by U. P. S. A. be approved before any new or additional authority could be issued to any carrier subsidiary; and whether an application by a contract carrier, such as U. P. S., for common carrier authority gave rise to so different a carrier status as to require a concurrent application, under Section 5, by the parent U. P. S. A. and the other carrier subsidiaries of U. P. S. A.

1. Illustrative of Intervenor's supple approach is a reference to the Examiner's report (Int. Brf., 2-3) which is designed to create the impression that the Examiner, who heard the witnesses and initially appraised the evidence, approved the entire application filed by U. P. S.

The contrary is true; the Examiner recommended denial of that portion of the application which directly affected the Appellants.

Intervenor refrains also from pointing out that one of the three members of Division 1 of the Commission dissented from the report granting the U. P. S. application and four Commissioners dissented from the Commission's order denying the Appellants' respective petitions for reconsideration.

2. Intervenor incorrectly described the motion and the complaint filed by the Appellants (Int. Brf., 4). Appellants' motion sought a stay pending an investigation requested by their complaint. In effect, the Appellants asked the Commission to investigate the existing illegal control relationship among the members of the United Parcel Service family including and in addition to, U. P. S. and U. P. S. A. The dismissal of the complaint,

contrary to the Intervenor's statement (Int. Brf., 4), did not vindicate the illegal control relationship.

Indeed, the Commission implicitly acknowledged that the control relationship between U. P. S., U. P. S. A., United Parcel Service of Pennsylvania, Inc. (herein called "United of Pennsylvania"), and United Parcel Service of Portland (hereinafter called "Portland"), has never been approved as required by Section 5 of the Act. In *Yale Transport Corp., et al.* v. *United Parcel Service, Inc., et al.*, Docket No. MC-F-7321, the Commission found as follows:[2]

> "(1) That the transaction presented under section 5 of the act in *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473 (1941), involving as party vendee the Portland company, was approved and authorized before the decision in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944); and (2) that the Pennsylvania company was granted a permit as a contract carrier by motor vehicle in *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938), as supplemented in 20 M. C. C. 799 (1939) and 22 M. C. C. 243 (1940), prior to the decision in *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 626 (1944); and that institution of an investigation under Section 5(7) of the act, or to find merit in the complaint, based on retrospective application of the principles stated in the *Refiners* and *Hannon* cases, and would be unreasonable,

---

[2] Footnote 2 to the U. P. S. motion, p. 9, quotes the order of Division 4 in the complaint proceeding. The findings of the Commission, as indicated above, on reconsideration, were totally dissimilar.

United States v. *Alabama Railroad Co.*, 142 U. S. 615, cf. *Yale Transportation Corp. et al.* v. *United States, et al.* (60 Cv. 1945), F. Supp. filed June 10, 1960."

The unlawful control relationship which was created in at least these two instances was also recognized by the Court below (J. S. 40). The action of the Commission in granting a Certificate to U. P. S., and the affirmance by the District Court, is contrary to the Act and the decisional precedents thereunder. There is no question of the retrospective application of the principles enunciated in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), and *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944).

3. Contrary to Intervenor's bland statement that Appellant's *only* allegation of unlawful control is that acquisition by U. P. S. of common carrier authority constitutes the acquisition of a new carrier by U. P. S. A. (Int. Brf., 9), Appellants pointed out that since 1935, in two proceedings [*United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M. C. C. 474 (1941); *United Parcel Service of Pennsylvania, Inc.—Contract Carrier Application*, 10 M. C. C. 83 (1938)], an unlawful control relationship was created and existed which was never approved, and that no further authority should or could be granted to any subsidiary of U. P. S. A., including U. P. S., until the illegal control relationship was approved by the Commission.

The mere fact that the Commission (in what may perhaps be an exercise of allowable discretion) elected not to investigate the illegal control relationship which exists

between U. P. S. A., U. P. S. and the other carrier subsidiaries of U. P. S. A., does not mean that the Intervenor is entitled to a reward because it initiated and continued the proscribed relationship. Intervenor's straw-man argument (Int. Brf., 13) that Appellants seek to collaterally attack the orders in the two cited cases is manifestly without merit. To be sure, Appellants do contend that the grant of common carrier authority to a contract carrier subsidiary of U. P. S. A. required Section 5 approval, but even if it could be argued that a grant of common carrier authority to a contract carrier does not create a new carrier, the authorization of new common carrier authority does alter the carrier relationships among U. P. S. A., U. P. S., and the other carrier subsidiaries of U. P. S. A. and this rearrangement falls clearly within the framework of Section 5 of the Act.

Since, concededly, a newly created subsidiary of U. P. S. A. could not be granted common carrier authority unless a contemporaneous Section 5 application was filed by U. P. S. A. and approved, it is manifest that the mere fact that U. P. S. was controlled by U. P. S. A. prior to 1935 does not forever insulate U. P. S. A. and U. P. S. from the application of Section 5, particularly where, as in this case, the Commission itself held, implicitly at least, that Section 5 had been violated. The principle of *Greyhound Mergers*, 1 M. C. C. 342 (1935) did not free the United family from the duty to obtain approval of subsequent unlawful control relationships. The *Greyhound* case teaches only that control relationships effectuated prior to 1935 are beyond the reach of Section 5 of the Act. In the instant case, since these unlawful control relationships were accomplished subsequent to 1935, Section 5 approval was required.

In short, there being a concededly illegal control relationship among U. P. S. A., U. P. S. and other carrier

subsidiaries of U. P. S. A., any application for any new privilege or authority under the Act requires approval of the control relationship.

The legislative history of Part II of the Act shows an unequivocal Congressional intention to create classifications of carriers. A carrier is not a "carrier", irrespective of the type of authority held. The Act in numerous explicit sections imposes specific requirements upon each class of carrier[3] [*Pregler Extension of Operations*, 23 M. C. C. 691 (1940)].

The Commission has pointed out that:

> "Freedom to solicit customers without a restriction to specialized service will obliterate the distinction between common and contract carriers which Congress prescribed."
>
> 70th Annual Report of the Interstate Commerce Commission (1956).

The Act was recently amended (Pub. L. 85-163, Sections 1(1), (2), 71 Stat. 411) by Congress so as to maintain and preserve the basic differences between common and contract carriers (49 U. S. C. 309).

4. The Appellees wrongly state (App. Brf., 5) that Appellants did not attempt to show the effect upon the public, including other carriers, of a grant of authority to a member of the United Parcel Service family. But the record shows clearly that there was reference to other

---

[3] The following sections of Part II of the Act apply to contract carriers exclusively: 203(a)(15); 204(2), 209(a), 209(b), 218 and 220(a).

[4] The following sections of Part II of the Act apply to common carriers exclusively: 203(a)(14), 204(1), 206, 207, 217, 216, 223.

subsidiaries of U. P. S. A. and the nature of the widespread arrangements among United Parcel Service carriers. Indeed this fact was made clear in Appellants' motion for a stay and in their complaint.

Surely, the fact that the Commission does not propose to investigate a past illegal control relationship or elects not to proceed against past violations does not give rise to a permanent exemption from the requirements of Section 5.

5. Intervenor wrongfully suggests that by raising the control issue, Appellants sought to collaterally attack past orders or that the issue of illegal control was an afterthought. (Int. Brf., pp. 9 and 13). Both contentions are plainly without merit. To begin with, Appellants do not and did not contend that the United family must now divest itself of "Portland" or "United of Pennsylvania" because control was achieved in violation of the Act. However, Appellants urge that before a certificate could lawfully be issued to U. P. S. or any other carrier subsidiary, the unapproved control relationships must be submitted to the Commission for approval.

The control issue was raised when the matter was pending before the Commission and when the Commission could correct its error. Unfortunately, Appellee adopts Intervenor's erroneous contention (App. Brf., 2).

The issue of illegal control is a jurisdictional question which may be raised at any time. [*United States* v. *Marshall Transport*, 322 U. S. 31, 88 L. ed. 1110 (1944); *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 1 L. ed. 2d 726 (1957)]. Illegal control is not a mere matter of procedure which can be waived. When Section 5 is involved, as it is in this case, the Commission has no jurisdiction to grant a certificate.

Section 207 of the Act (49 U. S. C. §307) provides that a Certificate cannot issue unless the applicant is "* * * able * * * to conform to the provisions of this chapter and the requirements and rules and regulations of the Commission thereunder * * *." Since U. P. S. A. U. P. S. and the various subsidiary motor carriers are not in compliance with the Act, the Commission, as in *Marshall, supra*, had no jurisdiction to issue a certificate to United in this proceeding. This is not a matter of administrative discretion nor a matter of policy which the Commission may read into the Act. The language of the statute is explicit and allows for no exception.

In summary, the Commission could not grant a Certificate to United as a matter of law and not because of mere retroactive application of decisional precedents.[4] The unlawful control relationship within the United family is not being collaterally attacked. If the Commission had maintained the *status quo ante*, a refusal to institute a proceeding under Section 5(7) might be logical. However, where a Certificate is granted, the *status quo* is altered and the Commission must approve the control relationship, as a condition precedent to the issuance of a Certificate.

For the same reason, failure on the part of Appellants to appeal to the Court from the Commission's refusal to investigate the U. P. S. A. family (Int. Brf., 13), does not arrest the jurisdictional force of Section 5.

The principle urged by the Appellants was adopted by the Commission in the *Hannon* case, *supra* and re-

[4] Indeed there is no principle of law which, in a case such as this, precludes retroactive application of a correct construction of the law. *Atlas Tack Corporation* v. *New York Stock Exchange*, 246 F. 2d 311 (C. A. 1, 1957); *Leedom* v. *I. B. E. W.*, 278 F. 2d 237 (C. A. D. C. 1960).

cently reaffirmed in *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959). Nevertheless, without rational explanation [*Secretary of Agriculture, etc.* v. *United States*, 347 U. S. 645, 98 L. ed. 1015 (1954)], the Commission, in this case, departed from its prior norms and granted United a Certificate contrary to the Act.

Intervenor's and the District Court's reliance upon *Pan American Airways Co.* v. *Civil Aeronautics Board* [121 F. 2d 810 (C. A. 2, 1941)] are misplaced. So, too, the suggestion by the District Court and the Appellees that the Commission may grant new operating rights "when the violation of Section 5(4) has been due to excusable oversight or neglect" (J. S. 38) is plainly erroneous. As set forth in the Jurisdictional Statement (pp. 10, 11, 12) the sequence of actions following the *Pan American* case, *supra*, shows that the Commission rejected that decision[5] and construed the Act as prohibiting the Commission from issuing any new authority to an applicant where there was an unlawful control relationship. This case is the first instance where the Commission has granted new authority where there is an admitted unlawful control relationship.

6. Intervenor incorrectly suggests (Int. Brf., 12) that this issue was involved in *Railway Express Agency, Inc.* v. *United States* [153 F. Supp. 738, S. D. N. Y. (1957) aff'd *per curiam*, 355 U. S. 270 (1957)]. Indeed, the questions concerning the applicability of Sections 5, 210 or

[5] In the *Hannon* case, *supra*, the Commission refused to issue a Certificate to an applicant which was a party to an unlawful control relationship. Prefacing the citation of the *Pan American* case with the word "Compare", clearly shows that the Commission rejected this decision which arose under the Civil Aeronautics Act and held that insofar as the Act was involved, no new authority could be granted in the face of violations of Section 5.

221 of the Act (49 U. S. C. Sections 5, 310 and 321) were not raised in the proceedings before the Commission or the Courts in the *Railway Express* case, *supra*.

POINT II

The findings of fact are not supported by substantial and probative evidence.

Contrary to Intervenor's statement (Int. Brf., 5), Appellants did not oppose the application on the ground Intervenor pretends is at issue, namely, that parcel post service is adequate (Int. Brf., 5). This was not the issue at all. Whether parcel post is efficient or inefficient was only remotely relevant. The case before the Commission required affirmative proof and evidence of public convenience and necessity by U. P. S., namely that (a) the existing service provided by the protestants and by other carriers (who did not protest) was and is inadequate; (b) U. P. S. would and could cure any alleged defect in the existing service; (c) a grant of authority to U. P. S. would not adversely affect protestants, including Appellants and other carriers; (d) the grant of common carrier authority to U. P. S., then a contract carrier, did not violate statutory and decisional criteria; (e) the fact that U. P. S. was part of a vast congerie of carriers, was not a relevant element in considering the effect upon existing carriers including the protestants; and (f) the control relationship, which existed between U. P. S., U. P. S. A. and other subsidiaries, was irrelevant. (*Pan America Bus Line Inc.*, 1 M. C. C. 190 (1936).

Intervenor and Appellees sedulously avoid reference to these issues because the record shows that Intervenor did not sustain the burden of proof.

It may be noted that the District Court in this case found, "Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case" (J. S., p. 30).

Appellees concede that the Commission considered the matter of United's proposed low rates in issuing a Certificate to United but contend that " • • • appellants have confused the interest in lower rates with an assumption that this factor alone was their endorsement of the application and for the Commission's subsequent approval" (App. Brf., 7-8).

Appellants respectfully submit that the express finding of the Commission that " • • • shippers would use the proposed service if the charges are reasonably competitive with those of parcel post" proves conclusively that rates were the sole factor considered (79 M. C. C. 635). Thus, contrary to the erroneous impression created by Intervenor (and except for the testimony of an insignificant handful of the 84 supporting witnesses) shipper support was predicated solely on rate considerations. Indeed, as found by the District Court:

> "Protestants did elicit, in their cross-examination of a considerable number of shipper witnesses, testimony, in varying degrees of emphasis, that the cost of any service was a consideration and that, however attractive applicant's proposed service was, the attraction would disappear if there were a substantial rate differential as against parcel post" (J. S. p. 32).

Isolated instances of shipper support not related to low rates afford no basis for a finding that United's better

"mousetrap" met the tests of public convenience and necessity. Surely, this did not constitute the "substantial" evidence required by Section 10(e) of the Administrative Procedure Act [5 U. S. C. Section 1009(e)] to support a finding of the Commission.

Absent the promise of lower rates by United, there was no support for the application. The only complaint against the service of existing carriers was that their level of rates, as approved by the Commission, was excessive.

Appellants submit that the decision by the Commission in this case is contrary to a long line of judicial and quasi-judicial decisions, which construed the statutory standard of "public convenience and necessity."

Appellees do not even attempt to explain away the position of the Commission in *Schaeffer Transportation Co. v. United States*, 353 U. S. 83, 92 (1958), where it was argued that the Commission "* * * always considered rates irrelevant in certificate proceedings under Section 207(a)."

It is a basic principle of transportation law that if a shipper is aggrieved by existing rates, Section 216 provides statutory redress. *Superior Trucking Company, Inc. Extension—Wisconsin*, 77 M. C. C. 519 (1958).

Concededly, the District Court did attempt to distinguish the *Schaeffer* principle and other precedents by finding that since the rate consideration was not the sole basis of support for the application, the Commission properly approved it. Obviously, the District Court misread *Schaeffer, supra*, and the other cases which hold that evidence of lower rates is admissible only in cases affecting different modes of transportation.

Appellants also contend that if rates are relevant in a Section 207 proceeding, then an applicant must adduce probative evidence that it can profitably operate under its proposed rate scale. Even the District Court found that such evidence was "meagre" (J. S. 33). The fact is that it was non-existent. There was no evidence at all to support the Commission's speculative and conjectural finding that United "made a favorable showing" that it would realize a profit. The fact is that United refused to submit cost data so that such a showing was impossible. Additionally, there was no evidence to sustain the inference upon an inference relied upon by the District Court (J. S. 33) to justify its conclusion that the operations of U. P. S. could be conducted profitably.

There is one other factor which establishes that the service of U. P. S. was not required by the public convenience and necessity; namely, the availability of service from Appellants and other motor carriers. Even the Examiner found that there was no need for the service in the New York origin area.

POINT III

Sections 210 and 221(b) of the Interstate Commerce Act.

No reference is made in the reply to Appellees' contentions regarding Section 221(b) of the Act [49 U. S. C. §321(b)] or the issue of dual operations since these are adequately treated in the Jurisdictional Statement.

CONCLUSION

For all of the reasons urged in the Jurisdictional Statement and this reply, the motions to affirm should be denied, and the judgment of the Court below reversed.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp. and Stone's Express, Inc., Appellants, and Railway Express Agency, Incorporated, Intervenor-Appellant,
Office & P. O. Address,
160 Broadway,
New York 38, New York.

March 14, 1961.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

PETITION FOR REHEARING

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp., and Stone's Express, Inc., Appellants and Railway Express Agency, Incorporated, Intervenor-Appellant.
160 Broadway
New York 38, N. Y.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

INDEX

	PAGE
I	2
II	2
III	6
IV	7
Certificate	7

CASES CITED

Alleghany Corp. v. Breswick & Co., 353 U. S. 151, 1 L. ed. 2d 726 (1957)	5
Florida v. United States, 282 U. S. 194, 74 L. ed. 291 (1939)	4
M. J. Hannon—Control—Hannon Motor Lines, Inc., 39 M.C.C. 620 (1944)	3, 4
Pan American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810 (CA 2, 1941)	3, 4
Schaffer Transportation Co. v. United States, 355 U. S. 83, 2 L. ed. 2d 117 (1957)	7
Schwerman Trucking Co. — Control — Schwerman Trucking Co. of Texas, 80 M.C.C 382 (1959)	3

PAGE

Secretary of Agriculture of the United States v. United States, 347 U. S. 645, 98 L. ed. 1015 (1954) 4

Service v. Dulles, 354 U. S. 363, 1 L. ed. 2d 1403 (1957) 3

United States of America v. American Trucking Associations, Inc., et al., 310 U. S. 534, 84 L. ed. 1345 (1940) 3

United States of America v. Leslie Salt Company, 350 U. S. 383, 100 L. ed. 441 (1956) 3

United States v. Marshall Transport, 322 U. S. 31, 88 L. ed. 1110 (1944) 5

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 95 L. ed. 456 (1951) 6

STATUTES CITED

Interstate Commerce Act (49 U.S.C. Section 5) ... 2, 3, 4

Interstate Commerce Act (49 U.S.C. Section 307) 2, 3, 4, 6

Civil Aeronautics Act (49 U.S.C. Sections 1301 et seq.) 3

Administrative Procedure Act (5 U.S.C. Section 1009(e)) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

PETITION FOR REHEARING

Yale Transport Corp., Empire Carriers Corp., Stone's Express, Inc. and Railway Express Agency, Incorporated (herein collectively called "Appellants"), respectfully petition, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on March 20, 1961, which affirmed (Mr. Justice Black dis-

senting) the decision of the United States District Court for the Southern District of New York. In support of the petition, Appellants respectfully show and allege:

I

This Honorable Court foreclosed proper consideration of important questions concerning the interpretation and meaning of at least two of the more important sections (49 U.S.C. Sections 5 and 307) of the Interstate Commerce Act (herein called the "Act") by rejecting oral argument and by denying Appellants an adequate opportunity to develop the issues by comprehensive briefs.

Appellants respectfully submit that this Honorable Court's judgment of affirmance establishes a precedent which is contrary to the letter and spirit of the Act and subverts the intent and objectives of Congress. Moreover, the judgment of affirmance renders earlier decisions of this Honorable Court meaningless or, at least, of dubious authority.

II

Appellants have repeatedly alleged (as the Interstate Commerce Commission [herein called the "Commission"] and Intervenor-Appellee ultimately conceded) that Intervenor-Appellee (herein called "U.P.S.") was and still is a party to an unlawful control relationship between and among U.P.S., its parent and various other motor carrier subsidiaries of the parent. Since the control relationship was created subsequent to the passage of the Act (in 1935), the approval of the Commission, under Section 5 of the Act, was required but never obtained. Accordingly, when U.P.S. applied for a Certificate of Public Convenience and Necessity, it was then party to an unlawful control relationship which carried with it important monopoly impli-

cations. At no time during the course of the proceedings before the Commission did U.P.S., the parent or the other subsidiaries of the parent file an application with the Commission seeking to correct the illegal control arrangement or to legalize it by an appropriate proceeding. These facts are not in dispute but were apparently overlooked by this Honorable Court.

Prior to the decision in this case, the Commission consistently held that an application for a Certificate of Public Convenience and Necessity would not be approved if the applicant was a party to an unlawful control relationship in violation of Section 5 of the Act. *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M.C.C. 620 (1944); *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M.C.C. 382 (1959).

Indeed, the Commission had rejected the contrary conclusion of *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (CA 2, 1941). The Second Circuit in the *Pan American* case, *supra* held that under comparable provisions of the Civil Aeronautics Act (49 U.S.C. Sections 1301 *et seq.*) an applicant was not barred from receiving a new license from the Civil Aeronautics Board despite the fact that there was illegal control. However, the Commission, in the *Hannon* case, *supra*, specifically and unequivocably rejected the principle of the *Pan American* case, *supra*. In short, the position of the Commission was that new authority would not be granted under Section 207 of the Act (49 U.S.C. Section 307) where unlawful control, in violation of the Act, had been accomplished. In the absence of judicial decisions to the contrary, the Commission's consistent construction of the Act was and is entitled to great weight. *Service* v. *Dulles*, 354 U. S. 363, 1 L. ed. 2d 1403 (1957); *United States of America* v. *Leslie Salt Company*, 350 U. S. 383, 100 L. ed. 441 (1956); *United States of America* v. *American Truck-*

ing Associations, Inc., et al., 310 U. S. 534, 84 L. Ed. 1345 (1940). The departure from this unvaried interpretation by the Commission in the case at bar is unexplained and should have been condemned. *Florida* v. *United States*, 282 U. S. 194, 74 L. ed. 291 (1939); *Secretary of Agriculture of the United States* v. *United States*, 347 U.S. 645, 98 L. ed. 1015 (1954). What is significant is that the judgment of affirmance by this Honorable Court adopts the Commission's unexplained departure from statutory provisions and decisional principles without suggesting in what respects the Commission's new view accords with the law. The fact is that there was no rational explanation for the departure by the Commission from the principle of the *Hannon* case, *supra*.

It is also evident that the Court below erroneously concluded that *Pan American, supra*, was controlling although the Commission had held to the contrary in its own decisions. The judgment of affirmance by this Honorable Court compounds the error.

It is also clear that the statute and prior decisions by this Honorable Court precluded the issuance of a Certificate of Public Convenience and Necessity to anyone who, like U.P.S., is currently in violation of Section 5 of the Act (49 U.S.C. Section 5). Section 207 of the Act (49 U.S.C. Section 307) expressly provides that a Certificate shall not be granted where an applicant does not "conform to the provisions of this chapter and the requirements and rules and regulations of the Commission . . . ." U.P.S. could not comply with the "provisions of this chapter" so long as it violated Section 5, as it surely has and does. Illegal control, proscribed by Section 5, cannot be waived nor is it a matter which, in the exercise of administrative discretion, can be ignored as the Court below erroneously held. The language of the statute is clear, unambiguous and mandatory. Thus, in *United*

States v. *Marshall Transport*, 322 U.S. 31, 88 L. ed. 1110 (1944) and *Alleghany Corp.* v. *Brayswick & Co.*, 353 U.S. 151, 1 L. ed. 2d 726 (1957) this Honorable Court held that Section 5 issues are jurisdictional. Hence, the Commission could not, as a matter of law, issue a Certificate to U.P.S. This important legal consideration was apparently overlooked by this Honorable Court.

Contrary to the contentions of the Appellees, U.P.S. would not be penalized by a retroactive application of the *Marshall* case, *supra*. Appellants have never contended that the United Parcel family be required to divest itself of any authority previously granted by the Commission. Appellants do contend, however, that the *status quo* should not be altered by a special reward to U.P.S. and that new authority, should not have been granted to U.P.S. unless and until the illegal control relationships was cured by an appropriate proceeding under Section 5 of the Act. This issue was squarely presented in this case and the Commission had the statutory duty and obligation to withhold issuance of a Certificate pending the resolution of the unlawful control questions raised by the Appellants. If the Commission had not altered the *status quo* by granting a new Certificate, then the refusal to institute an investigation, as requested by Appellants in a companion proceeding, might have been warranted. But when new authority was granted, the status of U.P.S. was altered and the Commission was required to approve the control relationship, as a condition precedent to the issuance of a Certificate.

In any event, the *Marshall* case, *supra*, was decided long before the U.P.S. proceeding was instituted and Appellees are presumed to know the law. Accordingly, the control matters could and should have been decided by the Commission before any Certificate was issued to U.P.S.

In effect, the judgment of this Court sanctions the grant of licenses and privileges by an administrative agency to an applicant who violates the law administered and enforced by that agency even where the statute has been construed by this Court so as to preclude the challenged administrative action.

III

There has been a radical departure by this Court from the principles enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 95 L. ed. 456 (1951) and the Congressional mandate of Section 10(e) of the Administrative Procedure Act (5 U.S.C. Section 1009(e)). The decision by the Court below merely rubber stamped the Commission's determination that U.P.S. had established that the Certificate was required by the present and future public convenience and necessity. But there was no independent judicial review to ascertain whether there was substantial evidence, considering the record as a whole, which supported the decision of the Commission. Thus, it was admitted that if rates are a factor in a proceeding under Section 207 of the Act (49 U.S.C. Section 307) then U.P.S. had the burden of establishing that the proposed operations could be profitably conducted at the proposed level of rates. The Court below stated that the evidence here was "meagre" and that U.P.S. would not have filed this application unless it was of the opinion that the proposed operations would be profitable. "Meagre" is not a substitute for that degree of substantial evidence which is required to support an extensive grant of operating authority.

Not only was the evidence "meagre" as to rates, but it was "meagre" as to the other essential elements of proof required to establish public convenience and necessity,

namely, that there was a public need for the U.P.S. service; that existing motor carriers (including Appellants) were unable to provide the proposed service and that there would be no adverse effect suffered by existing motor carriers by reason of the grant of a Certificate to U.P.S. There was a palpable failure to observe the substantial evidence rule and the approval by the Court below of the Commission's determination, without ascertaining whether the Commission had acted in accordance with the mandate of Congress, was wrong. *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 2 L. ed. 2d 117 (1957).

IV

WHEREFORE, Appellants respectfully submit that a rehearing should be granted and upon rehearing, jurisdiction should be noted in order that an argument may be had before this Honorable Court.

Respectfully submitted

HERBERT BURSTEIN,
160 Broadway,
New York, New York,
Attorney for Appellants

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing in the United States mail on this the 16th day of May, 1961.

.....
HERBERT BURSTEIN